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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 439

IN THE MATTER OF

GEORGE R. JOSLYN,

BANKRUPT.

GEORGE R. JOSLYN,

Petitioner,

vs.

THOMAS HART FISHER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE FUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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vs.

THOMAS HART FISHER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, George R. Joslyn, petitions this court to issue a writ of certiorari to review a judgment (App. 77) entered by the United States Court of Appeals for the Seventh Circuit reversing a judgment entered by the Honorable Michael L. Igoe, presiding in the United States District Court, Northern District of Illinois, Eastern Division. The District Court approved a report of the referee recommending a denial of a petition for attorney's fees filed by respondent Fisher.

I.

OPINIONS BELOW.

The opinion of the appeals court *In re Joslyn* (1955, 7 Cir.), 223 F. 2d 184, is printed in the Appendix (App. 1-7).

The prior opinion by the court of appeals *In re Joslyn* (1952, 7 Cir.), 198 F. 2d 673, cert. den. 345 U. S. 905, 73 S. Ct. 640, in which the court approved a settlement of the litigation is in the Appendix (App. 17-21).

In the last mentioned opinion the court adopted the opinion of the district court, *In re Joslyn* (1951, D. C. Ill.), 102 F. Supp. 521, opinion adopted in 198 F. 2d 673. This is also printed in the Appendix (App. 57-64).

There is also printed in the Appendix the opinion *Joslyn, Thomas Hart Fisher, Assignee* v. *Joslyn* (1949), 337 Ill. App. 443, Appeal denied, 341 Ill. App. XIV, 86 N. E. 2d 367. This opinion and the state court proceeding was pleaded as an adjudication of facts between petitioner and respondent Fisher (App. 22-56).

There is also printed in the Appendix an opinion of the court of appeals reversing the findings of fraud and abuse of the bankruptcy process by respondent. The reversal is on the ground of lack of jurisdiction. *In re Joslyn's Estate* (1948, 7 Cir.), 168 F. 2d 803 (App. 65-72).

The decree settling this litigation *In re Joslyn,* 102 F. Supp. 521 (App. 57-64) was based upon a state court decree discharging the only claim in this bankruptcy. The opinion affirming said decree on appeals by respondent are reported in *Hillmer* v. *Chicago Bank of Commerce* (1953), 349 Ill. App. 510, appeal denied 351 Ill. App. XV, 111 N. E. 2d 194. This is printed in the Appendix (App. 8-16).

II.

JURISDICTION.

The Court of Appeals' opinion was filed June 1, 1955. Petition for rehearing was denied July 8, 1955. Jurisdiction is conferred by the Bankruptcy Act:

U. S. C. Title 11, Chap. 4, Sec. 47c:

> "c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments * * * of the United States courts of appeals in proceedings under this Act * * *,"

and the Judiciary Code:

U. S. C. Title 28, Chap. 81, Sec. 1254:

> "Sec. 1254. * * *. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil * * * case * * *."

III.

QUESTIONS PRESENTED.

(1)

That the Court of Appeals is making a farce of judicial process by reversing the District Court for not ruling upon Fisher's motion to strike appears from the following:

In his petition for fees filed April 2, 1953 Fisher stated "(7) * * * the respective items * * * will be disclosed to the referee in bankruptcy at the time this petition shall be referred to him" (Tr. 4).

Fisher prayed "that this Honorable Court will * * * refer this petition to the Referee in Bankruptcy" (Tr. 5).

The judge referred Fisher's petition with four others on April 10, 1953:

> "Ordered that the said referee shall hear such proofs as the parties in interest may offer and * * * determine whether * * * petitioners or any of them * * * be entitled to an allowance * * * and, if any, the amount thereof and report his findings and conclusions to this court" (Tr. 6).

Fisher never objected to this order.

On May 5, 1953 by leave of court "without prejudice to the order of reference" petitioner amended his answers (Tr. 50). Fisher (Tr. 55) and other claimants filed motions to strike petitioner's answers.

On May 20, 1953, Miller, one of the other fee claimants, presented to the judge a motion to set for hearing the several motions to strike. Mr. Miller told the judge his attention had been directed to the fact that the judge had "referred each of those legal questions, for instance the motion to strike the referee" and "that is quite agreeable." The judge stated:

> "It is my understanding the whole matter should be heard by the referee" (Tr. 65-66) "and when he finishes the matter you may come up here" (Tr. 66).

Mr. Crawford, Fisher's representative, was there and tacitly concurred in Mr. Miller's statement (Tr. 66-67).

The referee began taking testimony on May 25, 1953 (Tr. 111).

The referee

> "advised the respective attorneys that he was required, under the order of reference entered * * * on April 10, 1953, to hear and receive in evidence such proof as they should offer without ruling on the relevancy or materiality of the evidence offered until the evidence had been heard and considered and the report filed * * * Thereupon all the motions to strike portions of Joslyn's answer as amended were with-

drawn except the motions filed by Thomas H. Fisher and the trustee, Horce Young" (Tr. 97).

Fisher never withdrew his consent to the reference. He never asked the judge to change the order.

On June 19, 1953 Fisher filed a 150-page amendment to his petition for fees (Tr. 66). Petitioner's answer was never ordered to stand to Fisher's petition as amended. No answer was filed to Fisher's amended petition.

On June 25, 1953 Mr. Crawford, representing Fisher told the referee he would like to present a petition for review (Tr. 204-205).

The referee said he had made no ruling. He was acting as a master (Tr. 205). He explained that the order directed him to "hear such proofs as the parties in interest may offer" and report his conclusions (Tr. 206-207).

On July 10, 1953 Mr. Crawford stated to the referee:

> "Fisher * * * intends to return at the earliest opportunity to offer his proof in this case, at which time his proofs will, of course, consist of proving up all the time charges." (App. 73; Abst. 395, Master's Tr. 1166.)

On September 25, 1953 the referee entered a rule on Fisher to show cause why his proofs should not be closed by October 2. Fisher appeared on October 2 stating he would file his objections to closing proofs with the clerk (Tr. 244-245).

The referee filed his report on June 16, 1954 (Tr. 82), six and one-half months later.

Isn't the ruling by the court of appeals that the district court should formulate the issues making a farce of judicial process?

(2)

The statement by the Court of Appeals that the sufficiency of Fisher's petition as amended was not questioned (*Infra*, App. 3) is in the face of a six-page analysis by the referee holding the amended petition insufficient. It is in the face of point I of petitioner's brief contending that it was insufficient. The Court of Appeals' holding that Fisher's amended petition makes a prima facie case (*Infra*, App. 6) is an arbitrary disregard of the requirements of Section 62(d) of the Bankruptcy Act and U. S. District Court Rule 8.

Fisher's petition filed April 2, 1953 alleged "petitioner has been * * * the attorney at law for" ten named creditors (Tr. 2-3).

On June 19, 1953 Fisher filed a 150-page "Amendment" tabulating 7,708¼ hours (Tr. 111). It is impossible to determine from the petition (Tr. 2-4) and amendment (Tr. 66-72, 245-259) whether any one of the alleged 7,708¼ hours was a service compensable from the bankruptcy estate. (This was pointed out to the court of appeals on page 9 of petitioner's brief.)

The referee found Fisher's petition as amended to be insufficient. He made a six-page analysis of Fisher's allegations (Tr. 112-118). He points out expenditures in state court litigation (Tr. 112, 113, 114, 116), items on litigation in which Fisher alone was interested (Tr. 112, 114), a petition to remove the trustee's attorney (Tr. 114-115), briefs in support of affidavit of bias and prejudice (Tr. 116), petitions for contempt (Tr. 114, 118).

The referee concludes:

> "There is not any evidence to support a recommendation in respect of the petition of Thomas H. Fisher" (Tr. 121).

As pointed out by the referee (Tr. 126) the Act gives the right to creditors for limited services only.

U. S. C. Title 11, Chap. 7, Sec. 104:

> "#64 * * * one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases."

Nine of Fisher's alleged creditors could under no theory be construed to be petitioning creditors under the Act. It is impossible to determine from the petition (Tr. 2-4) and amendment (Tr. 66-72) that any one of the 7,708¼ hours was expended for any one or more of the ten alleged creditors. (This was pointed out to the court of appeals on page 9 of petitioner's brief.)

The court of appeals' holding is squarely contrary to Section 62(d) requiring itemization.

U. S. C. Title 11, Chap. 7, Sec. 102d:

> "62(d) * * * any attorney * * * seeking compensation for services rendered by him in a proceeding under this Act * * * shall file with the court his petition setting forth the value and extent of the services rendered, the amount requested * * *."

In the court of appeals petitioner contended under I of his Proposition of Law, "The order should be affirmed because Fisher did not comply with Section 62(d) nor with District Court Rule 8."

> "Fisher did not allege the value of his services, nor the extent of his services, nor the amount requested. This alone is sufficient to deny him any fees under 62(d) of the Bankruptcy Act.
>
> * * * * *
>
> "U. S. District Court Bankruptcy Rule 8 requires an itemization of the services of each attorney. Fisher never complied with this rule."

This is quoted from page 65 of petitioner's brief in the court of appeals.

The assertion by the court of appeals "It is not contended as we understand but that the amended claim compiled with the relevant provisions of the Bankruptcy Act, 11 U. S. C. Sec. 1 *et seq.*" (App. 3) is as erroneous as a statement can be.

Both the incorrectness of the above quoted statement and the insufficiency of Fisher's amended petition were pointed out to the court of appeals in the petition for rehearing at pages 6-9.

(3)

There is an irreconcilable conflict between the decision *In re Joslyn*, 198 F. 2d 673, cert. den. 345 U. S. 905 (App. 17-21) and the present decision by the same court, 223 F. 2d 184 (App. 1-7).

In the next previous appeal the only question decided by the court *In re Joslyn*, 198 F. 2d 673, was that the Elks and other bank creditors did not have provable claims. Judge Kerner pointed out that the state court suit against petitioner instituted back in 1932 was still pending and that under *Zimmerman* v. *Zeimer*, 363 Ill. 220, 1 N. E. 2d 854; *Decker* v. *Domoney*, 387 Ill. 524, 56 N. E. 2d 750; and *Babka Plastering Co.* v. *City State Bank*, 264 Ill. App. 142, no creditor could bring any suit while the class suit was pending. The last cited case is an exhaustive opinion written by Judge Kerner when he sat on the Illinois Appellate Court.

Judge Major now refers to his statement in the prior opinion and says that they are creditors. Judge Major's statement in this opinion is so contrary to Illinois law as to be almost unbelievable. *Zimmerman* v. *Zeimer*, 363 Ill. 220, 1 N. E. 2d 854.

(4)

In proceedings wherein Fisher as assignee of Mrs. Joslyn sued petitioner for attorney's fees, costs and expenses, the state court has made findings. These findings are a bar to the claim for attorney's fees involved herein.

By Illinois law these findings are receivable in evidence in any proceeding between Fisher and petitioner.

These findings are in the appendix in *Joslyn, Fisher Assignee* v. *Joslyn,* 337 Ill. App. 443, 86 N. E. 2d 367, appeal denied 341 Ill. App. XIV (App. 22-56) viz.:

Six years before intervening in this bankruptcy Fisher evolved a scheme to obtain for himself petitioner's interest in the Joslyn family trusts by fraudulent abuse of court process (App. 49-50, 30-37) (Petitioner's interest in the two trusts is the only asset ever involved in this bankruptcy).

To this end Fisher had fraudulently conducted a flood of litigation against petitioner (App. 52) and indulged in threats "akin to blackmail" before he began using this bankruptcy litigation (App. 50-51).

Fisher's activity in this bankruptcy proceeding "is inseparably involved with his activity" in his voluminous state court litigation against petitioner (App. 27, 35).

The alleged fees which Fisher was using the bankruptcy process to collect under two assignments of alimony and child support were fantastic in amount (App. 55).

On September 14, 1939, Fisher instituted in the name of Mrs. Joslyn in the state court a suit to sequester petitioner's interest in the trusts (App. 28-29).

On September 15, 1939 Fisher obtained an injunction in the divorce case restraining the trustees from paying $8437.50 to petitioner (App. 29-30).

Fisher had Mrs. Joslyn make two assignments to him

of her alimony and child support money (App. 30-33). He later claimed that Mrs. Joslyn had a lien on the trusts and by these assignments he acquired the lien.

On June 5, 1944 Fisher procured in the bankruptcy court an injunction against the trustees paying $8625 dividend to petitioner. Under this injunction the funds were accumulated in the First National Bank (App. 36-37).

On December 27, 1945, Sturtz, petitioner's bankruptcy attorney, asked U. S. Judge Barnes to modify the injunction to permit payment of $13,000 to petitioner to repay $4000 he had borrowed to pay alimony and to pay $9000 back alimony. Fisher falsely pretended before Judge Barnes not to know the amount due Mrs. Joslyn (App. 38).

When the order was entered Fisher falsely wired Mrs. Joslyn that the $9000 was for him (App. 38). Fisher afterwards asked Sturtz to deliver the money to Fisher in cash (App. 39). He got a power from Mrs. Joslyn to endorse the check. Fisher and Crawford stood guard at the First National Bank and insisted that the bank not pay the check unless the $9000 was given to Fisher (App. 39). Actually only $5320 was payable to Mrs. Joslyn under the divorce court order. The balance was for taxes and for 42 creditors of Mrs. Joslyn (App. 39).

On January 4, 1946 Sturtz presented a petition setting up the divorce court order and to restrain Fisher from interfering with payment of $13,000. Fisher falsely told Judge Barnes that he had never asked that the $9000 be paid to him. Judge Barnes told Fisher that he had indulged in a trick (App. 39). Fisher then argued that the $13,000 should not be released.

From the money petitioner sent $5320 to Charlotte C. Joslyn. In order to obtain this money, Fisher by letter and by telegram employed the grossest of false representation (App. 40-41).

A large part of the $5320 was income to Fisher (App. 42).

On February 13, 1946 Fisher filed in the state court a supplemental complaint asking for an increase in alimony and child support and to establish a lien upon the funds accumulated under the bankruptcy court injunction in the First National Bank. He had process served upon the bank (App. 35).

On December 19, 1946 Fisher filed a cross petition in the divorce case asserting that under his second assignment of alimony he was entitled to be substituted as the complainant in the supplemental complaint in lieu of Charlotte C. Joslyn and to have the lien upon the trusts and the money in the bank under the bankruptcy court injunction decreed to him (App. 35-36).

The attorney for the trustee brought proceedings before Judge Barnes in the bankruptcy court to remove Fisher's asserted lien. Fisher testified falsely at great length before Judge Barnes in order to maintain a lien upon the funds accumulated under the bankruptcy injunction in the First National Bank (App. 45-47).

NOTE: On January 24, 1947 Judge Barnes found: Fisher's representations to the court in these proceedings were wilfully false in material respects. Fisher's activity in obtaining the $5320 was in violation of the expressed wishes of the court in freeing the money from the restraining order. Fisher had perpetrated a gross fraud upon the bankruptcy court. Fisher's acts were motivated by his own selfish interest to procure financial advantage to himself in his individual capacity. He wilfully obstructed the efforts to obtain an early settlement in the bankruptcy estate (App. 68). The court ordered Fisher to pay the $5320 to the bankruptcy trustee and to discharge the alleged lien he was asserting upon the funds in the First National Bank accumulated under the injunction (App. 69).

Although it found no lack of proof to sustain the findings of fraud against Fisher, the court of appeals reversed the judgment alleging want of jurisdiction. *In re Joslyn's Estate,* 168 F. 2d 803, 807 (App. 65-72, at 72).

The Court of Appeals' decision (App. 65-72) 168 F. 2d 803 is contrary to established law.

In re Pascal (1870), 77 U. S. 483, 491; 19 L. Ed. 992, 994.

The court has power over its own officers by summary proceedings to punish them for fraud or dishonesty.

In re Long (1942), 287 N. Y. 449, 453-454; 40 N. E. 2d 247, 249-250.

Hess v. *Conway,* 92 Kan. 787, 796; 142 P. 253, 256.

5 Am. Jur. p. 344, Sec. 143.

Fisher filed an affidavit of bias and prejudice against Judge Barnes. The case was assigned to Judge Shaw.

On February 9, 1948 Judge Snaw filed a written opinion.

Among other things he said:

"The next move in this court came eight years after the alleged bankrupt had been discharged, and was obviously engineered by Thomas Hart Fisher as a sort of a legal blackmail in an effort to extort enormous fees from George R. Joslyn in connection with the old divorce case" (Abst. 433-434; Jos. Ex. 19C) (App. 75-76).

Judge Shaw dismissed the entire proceeding on June 1, 1948.

The appeals court on December 3, 1948 reversed Judge Shaw's order on the ground that he had vacated an order entered by Judge Barnes, *In re Joslyn's Estate,* 171 F. 2d 159, 167.

The recitals of fact by Judge Shaw were not vacated.

After Fisher's claim for fees had been adjudicated against Fisher the trustee suggested to Judge Igoe that the bankruptcy should be kept open so Fisher

could file a claim for his "equitable lien." Judge Igoe pointed out that Fisher had been found guilty of flagrant abuse of court process primarily in his own interest (App. 63).

(5)

Fisher is not entitled to a fee because his services were rendered under a champertous contract.

Fisher prosecuted these proceedings in the name of the Elks under a letter contract:

"Mr. Thomas H. Fisher May 14, 1944

"Dear Sir:

"Benevolent and Protective Order of Elks * * * desires you to act as its attorney-at-law in filing its 'Application to Reopen' * * * in connection with its claims as creditor of George R. Joslyn, Bankrupt.

"* * * It is our understanding that no court costs or attorney's fees shall be paid to you by the Order and that we shall not be liable or responsible for any part of the same, except that you shall be paid by the Order one-third of all sums recovered by the Order by reason of its claims in this bankruptcy proceeding as your attorney's fees * * *

Yours very truly,

Benevolent and Protective Order of Elks."

(Abst. 398-399, Jos. Ex. 13) (App. 74-75).

This contract is champertous. No recovery can be had for services rendered thereunder under Illinois law.

Dreyfuss v. *Jones* (1904), 116 Ill. App. 75, 79.

Geer v. *Frank*, 179 Ill. 570, 574-575; 53 N. E. 965, 966.

Illinois courts made a recent construction of the Illinois statute governing champerty, *Atchison, T. & S. F. Ry. Co.* v. *Andrews* (1949), 338 Ill. App. 552, 567; 88 N. E. (2) 364,

371. Petitioner raised this defense before the master. The District Court's conclusion was:

> "Since the recommendation * * * is against any allowance to Fisher, the agreement between him and the Elks is not discussed." (Tr. 121.)

In *Vanstone Bondholders Protect. Com.* v. *Green* (1946), 329 U. S. 156, 91 L. Ed. 163, 165 and 169, this court held that the rights of creditors of the bankruptcy estate are fixed by state law. The court of appeals erroneously held *Watkins* v. *Sedberry,* 261 U. S. 571, 576; 43 S. Ct. 411; 67 L. Ed. 802 applies. In that case the court had before it a question of a contract between the bankruptcy trustee and his attorney. The court of appeals should have applied the law of Illinois. It has erroneously applied the law in relation to a contract between a bankruptcy trustee and his attorney.

IV.

STATUTES AND RULES.

U. S. C. Title 28, Sec. 1738.

> "Sec. 1738 State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit.
>
> * * * * *
>
> "Such Acts, records and judicial proceedings or copies thereof, * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State, * * * from which they are taken."

U. S. C. Title 11, Chap. 7, Sec. 104.

> "Sec. 64. * * * a. The debts to have priority, * * * shall be * * * one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases."

U. S. C. Title 11, Chap. 7, Sec. 102d.

> "62(d) * * * any attorney * * * seeking compensa-

tion for services rendered by him in a proceeding under this Act * * * shall file with the court his petition setting forth the value and extent of the services rendered, the amount requested * * *."

U. S. District Court Bankruptcy Rule 8.

"Rule 8. Compensation Applications. (a) * * * Applications for allowance by attorneys shall state in detail the services rendered by each attorney."

Rules of Civil Procedure, Rule 15(b).

"(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

#43 of General Orders in Bankruptcy U. S. C. Title 11, Chap. 4, foll. #53:

"The court may deny the allowance of any fee to the attorney for petitioning creditors or the reimbursement of his expenses or both, if it shall appear the proceedings were * * * not instituted in good faith."

Rules of Civil Procedure, Rule 53(c):

"Rule 53. Masters.

* * * * *

"(c) Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report."

V.

STATEMENT OF CASE.

For a statement of the case up to November 8, 1951, we respectfully refer the court to the opinion (App. 57-64) *In re Joslyn,* 102 Supp. 521 characterized in the opinion by Judge Kerner 198 F. (2) 673 (App. 17-21) as "excellent" (App. 19).

Petitions for Fees.

On April 2, 1953 Thomas H. Fisher filed his petition for fees and expenses (Tr. 2). He prayed for a reference (Tr. 4). The petition does not show what services were rendered nor for whom they were rendered.

On April 10, 1953 the court referred Fisher's petition and four others (Tr. 6).

On April 30, 1953 petitioner answered (Tr. 6). He alleged Thomas H. Fisher evolved a scheme in 1938 to obtain for himself interest in the two family trusts of August 14 and 15, 1935, or to obtain equivalent from petitioner's father and other members of petitioner's family. The scheme was to institute suits making fictitious charges against petitioner and other members of his family, to cause publicity in the newspapers and carry on harassment with injunctions and other court proceedings to force petitioner or petitioner's father to pay a vast sum of money to Fisher (Tr. 7). The answer alleged in detail sundry fictitious and fraudulent suits instituted by Fisher. Fisher's activity in these sundry suits was inseparably connected with his activity in the bankruptcy (Tr. 9-48).

On May 5, 1953 by leave of court (Tr. 48) petitioner pleaded an adjudication by the Illinois courts of last resort, *Joslyn, Fisher Assignee* v. *Joslyn,* 337 Ill. App. 443,

86 N. E. 2d 367, appeal den. 341 Ill. App. XIV (App. 22-56).

Fisher filed a motion to strike petitioner's answer. Some of the other fee claimants filed motions to strike.

In the reference of April 10, 1953 the judge ordered "that said referee shall hear such proofs as the parties in interest may offer" and report his findings (Tr. 5-6).

The referee began taking testimony on May 25, 1953 (Tr. 111).

The referee "advised the respectiv attorneys that he was required, under the order of reference entered * * * on April 10, 1953, to hear and receive in evidence such proof as they should offer without ruling on the relevancy or materiality of the evidence offered until the evidence had been heard and considered and the report filed * * *. Thereupon all the motions to strike portions of Joslyn's answer as amended were withdrawn except the motions filed by Thomas H. Fisher and the trustee, Horace Young." (Tr. 97.)

On June 2, 1953 (Tr. 160) the referee asked for Mr. Fisher. Mr. Crawford replied: "He is still in Raymondville, Texas. If he finishes up he will fly back" (Tr. 167). The parties present and the referee discussed the question of taking testimony without Mr. Fisher being present. The referee concluded: "We are going to have to wait until Mr. Fisher is here" (Tr. 168). The referee then asked, "When will Mr. Fisher be in town?" Mr. Crawford: "When I last talked to him he said he would possibly be back here tomorrow" (Tr. 168).

On June 4, 1953 before the referee:

> "Mr. Crawford: * * * Mr. Fisher is not through with the case in Texas. I got a telegram from him, and he said he will be there until Saturday. He said that he may be in here next week." (Tr. 169.)

Mr. Crawford told the referee:

> "Mr. Fisher has filed a petition for fees on his own behalf. * * * If he needs a lawyer, he won't need me, because he may need me as a witness. I can't be both witness and lawyer in the case." (Tr. 170.)

The case was called for hearing before the referee on June 11 (Tr. 184), on June 16 (Tr. 185), and on June 17 (Tr. 193).

On June 19, 1953 (Tr. 111) Fisher filed with the referee a motion to postpone the taking of testimony until disposition of a petition for review.

On the same day, June 19, 1953, Fisher filed a 150-page amendment to his petition for fees attaching a time record of 7,708¼ hours (Tr. 111).

On June 22, 1953 (Tr. 198) Fisher's amendment was called to the attention of the referee. Petitioner's counsel told the referee that he had not been served with it. Mr. Crawford stated that he had filed it with the clerk (Tr. 199). Mr. Crawford then presented an affidavit to the referee showing that Fisher was absent from the country (Tr. 200).

On June 25, 1953 the referee called the case:

> "Mr. Crawford: Your Honor, I would like to present on behalf of Mr. Fisher this petition for review, and a petition for stay pending the review.
>
> * * * * *
>
> "The Court: I have made no ruling. * * * I will not make any ruling until I report this matter to the judge, and at that time my ruling will be set up in my report (Tr. 204-205).

The referee read to Mr. Crawford the order of reference (Tr. 206). He then stated that the order of reference was the only authority he had (Tr. 206) and recapitulated:

> "* * * and all I can do is follow this order, which says:
>
> " 'It is further ordered that the referee shall

> hear said proofs as the parties in interest may offer,'
>
> and then skipping down to the balance of the paragraph it reads:
>
> "'* * * and report his findings and conclusions to the court'." (Tr. 206.)

NOTE: The referee's statement was in accord with 53(c) of the Rules of Civil Procedure, applicable to bankruptcy by General Order 37.

The referee stated that he was trying to follow the order of reference.

> "Mr. Crawford: I certainly appreciate your efforts" (Tr. 207).

The referee said he did not want to have a bungled hearing.

> "Mr. Crawford: I think your Honor recognizes that there is a possibility that a higher court might disagree with you" (Tr. 207).

On July 3, 1953 the referee gave George R. Joslyn permission to offer his evidence (Master's Tr. 728-729). On July 10, 1953 Mr. Crawford told the referee:

> "I heard from Fisher. * * * He intends to return at the earliest opportunity to offer his proof in this case, at which time his proofs will, of course, consist of proving up all the time charges, and so forth, in the document [Fisher's amendment] which has been shown me" (Abst. 395, Master's Tr. 1166) (App. 73).

Petitioner offered the records of Fisher's state court litigation (Tr. 120).

On September 25, 1953 the referee entered a rule on Fisher to show cause why his proofs should not be closed by October 2. Fisher appeared on October 2, 1953 stating he would file his objections to the closing of proof with the clerk. The referee told him that if he would read the record he would get the reasons why he had admitted in evidence the documents which he had received (Tr. 244-245).

On June 16, 1954 the referee filed his report. The referee states that he does not review the various state court proceedings. They are outlined and discussed in *Joslyn, Fisher Assignee* v. *Joslyn*, 337 Ill. App. 443 (Tr. 85). At page 95 the referee states that in *Joslyn, Fisher Assignee* v. *Joslyn*, 337 Ill. App. 443 (App. 27) the court observed that Fisher's activity in the bankruptcy is inseparably connected with his activity in the divorce case. The referee discusses in detail Fisher's petition with the 150-page amendment with 7,708¼ hours for which Fisher asked compensation. He holds that the great bulk of the items could not be compensable (Tr. 112-118). He found that the proceedings to reopen were intended by Fisher to obtain the objectives of Fisher's state court litigation (Tr. 118). He concludes, "There is not any evidence to support a recommendation in respect of the petition of Thomas H. Fisher" (Tr. 121). "Thomas H. Fisher has deliberately waived any and all claims to an allowance of attorney's fee and reimbursement of expenses in this proceeding by his refusal to appear and testify before the undersigned in support of his petition as amended" (Tr. 121).

He states that the agreement of May 14, 1944 between Fisher and the Elks was contended to be champertous and unlawful, but since his recommendation was against the allowance to Fisher, the agreement between Fisher and the Elks is not discussed (Tr. 121).

The report has excerpts from two letters by Fisher to Mrs. Joslyn which strongly indicate that Fisher was using the bankruptcy to force settlement of his other litigation (Tr. 118-119).

VI.

ARGUMENT.

(1)

The order of reference of April 10, 1953 directed the referee "to hear such proof as the parties in interest may offer" and to report his findings (Tr. 5-6). This order obviated the necessity of pleadings under Rule 15(b) of the Rules of Civil Procedure:

> "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."

Fisher in his petition stated he would disclose his items to the referee. He prayed that the court would refer his petition to the referee (Tr. 3-4). He did not object to the order of reference during the year and two months that the master had the petitions under the reference. Fisher never at any time withdrew his implied consent to the terms of the order.

> "At the hearings on the several petitions for fees, the undersigned [the referee] advised the respective attorneys that he was required, under the order of reference entered * * * on April 10, 1953, to hear and receive in evidence such proof as they should offer without ruling on the relevancy or materiality of the evidence offered until the evidence had been heard and considered and the report filed * * *. Thereupon all of the motions to strike portions of Joslyn's answer as amended were withdrawn except the motions filed by Thomas H. Fisher and the trustee, Horace A. Young." (Tr. 97.)

In fairness to the referee and the district judge, Fisher had a duty to prove up his fees. If he wanted the judge

to limit the issue to be heard by the referee, he had a duty to advise the court of his desire. If he wanted petitioner to take issue upon his amended petition for fees, it was Fisher's duty to obtain a rule to that effect.

After Crawford advised the referee that Fisher would come and prove his fees (App. 73) the referee held the hearings open from July 12 to October 2, 1953. He did not file his report until June 16, 1954.

For the court of appeals now to reverse the judge approving the master's report denying Fisher any fees is so gross a departure from the accepted procedure in U. S. courts as to call for the supervision of this court.

(2)

Sec. 62(d) of the Bankruptcy Act U. S. Code, Title 11, Chap. 7, Sec. 102d, requiring a petition setting forth (1) the value of the services rendered, (2) the extent of services rendered, and (3) the amount requested, has never been construed by this court.

The court of appeals in holding that a tabulation of numbers is sufficient is an arbitrary nullification of this section. Fisher's petition as amended nowhere complies with any one of the above requirements. Though his tabulation shows 7,708¼ hours he never alleged the value of any service that he rendered to the bankruptcy estate. It is impossible from his petition to determine the extent of any service. He never at any place stated the amount that he requested. He does not show for whom he rendered any of his alleged services.

The referee made a detailed analysis of Fisher's petition (Tr. 112-118) and he held it insufficient. Excerpts from Fisher's amendment appear in the printed record (Tr. 245-259). A glance at the tabulation will reveal that most of the items show they couldn't be the basis for an

allowance from a bankruptcy estate. The petition itself discloses nothing except that Fisher divides his time into categories and that he was the attorney at law for ten creditors (Tr. 2-5).

The petition does not anywhere allege that any particular service was a service to the bankruptcy estate. The 150-page amendment adds nothing as to what Fisher's services were (Tr. 66).

As already stated, the tabulation of hours shows the great bulk of the items could under no circumstances be a service to the bankruptcy estate. It is impossible to determine whether any one of the services was rendered to a creditor who could under any theory claim to be a petitioning creditor. The U. S. District Court Rule 8 requires the application to state "in detail the services rendered by each attorney." Fisher's tabulation of hours and his petition nowhere show what services were rendered by any attorney to the bankruptcy estate.

The statement by the court of appeals that the sufficiency of Fisher's amended petition is not questioned is such a departure from the accepted course of judicial proceedings as to call for an exercise of this court's jurisdiction. The holding that it makes a prima facie case nullifies the statute.

(3)

The court in harking to its then nonessential statement that Elks were a creditor (App. 7) is contradicting its prior holding.

The principal question decided in *In re Joslyn* (1952, 7 Cir.), 198 F. 2d 673 (App. 17-21), was that the Elks and other bank creditors did not have provable claims. The Court there said (pp. 674-675) (App. 19):

"That suit (*Hillmer* v. *Chicago Bank of Commerce*)

was brought in behalf of all creditors, including the Elks who have participated in distributions of moneys collected thereby to date.

* * * * *

when a bank is being liquidated because of insolvency, and a representative action is pending, an individual creditor cannot maintain an action at law to enforce the liability. *Decker* v. *Domoney*, 387 Ill. 524, 56 N. E. 2d 750; *Zimmerman* v. *Zeimer*, 363 Ill. 220, 1 N. E. 2d 854; *Babka Plastering Co.* v. *City State Bank*, 264 Ill. App. 142.

* * * * *

"Appellants contend that our ruling in 171 F. 2d 159, 167, that 'the Elks has a provable claim in the bankruptcy proceeding' is in conflict with this ruling. They assert that it follows from our earlier decision that some 12,000 creditors of the bankrupt who have participated in the state representative suit, as well as some 15,000 others * * * are entitled to have this bankruptcy proceeding held open for the possible filing now of claims.

* * * * *

"When we made the ruling now relied upon by appellants we were considering an appeal from the dismissal of the entire reopened proceeding on the ground that the Elks was not a creditor of the bankruptcy estate, and *we considered the Illinois decisions cited above in the light of that ruling without seriously considering the right in the reopened proceedings to prosecute it there.* Although we had referred to the fact that *the status of the Elks in the matter was immaterial* since the trial judge could have reopened the bankruptcy proceeding *sua sponte.* * * * In this situation we thought that the case, *Brown* v. *O'Keefe*, 300 U. S. 598, 57 S. Ct. 543, 81 L. Ed. 827, was authority for the proposition that the claim was provable in bankruptcy even though the stockholder had been adjudicated a bankrupt and discharged prior to liquidation of the liability and fixing of the amount thereof in the state court proceeding. *But we must note now, with reference to the relative status of the representative and the individual*

creditors, that the claimant in the Brown case was the receiver duly appointed pursuant to the National Banking Act, a status which appears to us to be comparable to that of the receiver appointed in the course of a creditor's representative suit to enforce stockholders' liability under the Illinois law." (*In re Joslyn* (1952, 7 Cir.), 198 F. 2d 673, 674-5.) (Emphasis added by us.) (App. 20-21.)

Now the same court by Judge Major (App. 7) holds the Elks are creditors in contradiction to the plain holding of Illinois Supreme Court, *Zimmerman* v. *Zeimer,* 363 Ill. 220, 1 N. E. 2d 854. In this the Court of Appeals has so far departed from the usual course of proceedings as to call for this Court's supervision.

(4)

Illinois courts have found (App. 22-56) Fisher conducted this bankruptcy proceeding in aid of his state court litigation. Fisher had been conducting his state court litigation as a means to extort from petitioner petitioner's interest in the two Joslyn family trust by fraudulent abuse of court process. He had been conducting this flood of fraudulent litigation for six years before he employed the processes of this bankruptcy proceeding. These facts have been found by the Illinois courts of last resort.

The holding by the Court of Appeals that these findings should be ignored is a denial of petitioner's rights.

The full faith and credit enjoined by the Code is that the United States Courts should give the same full faith and credit to these findings as the courts of Illinois would accord to them.

U. S. C. Title 28, Sec. 1738.

"Sec. 1738 State * * * Judicial Proceedings; Full Faith and Credit.

* * * * *

"Such * * * judicial proceedings or copies thereof * * * shall have the same full faith and credit in every court within the United States * * * as they have by law or usage in the courts of such State, * * * from which they are taken."

These findings by Illinois law may be relied upon in any suit between Fisher and petitioner.

Hanna v. *Reed* (1882), 102 Ill. 596, 602-603; 40 A. R. 608.

Little v. *Blue Goose Motor Coach Co.* (1931), 346 Ill. 266, 271; 178 N. E. 496, 497-498.

Healea v. *Verne* (1931), 343 Ill. 325, 331-333; 175 N. E. 562, 565-566.

Silurian Oil Co. v. *Neal* (1917), 277 Ill. 45, 50; 115 N. E. 114, 116.

These findings are material under No. 43 of General Orders in Bankruptcy, U. S. C. Title 11, Chap. 4, foll. No. 53. They constitute a defense under *Wood* v. *City Nat. Bank & T. Co.* (1940), 312 U. S. 262, 268; 85 L. Ed. 820, 825.

The court of appeals in holding that the district court should ignore the above state court proceedings wrongfully refused to give the full faith and credit enjoined under Title 28, U. S. C. Sec. 1738.

Davis v. *Davis* (1938), 305 U. S. 32, 59 S. Ct. 3, 83 L. Ed. 26.

Durlacher v. *Durlacher* (1941, 9 Cir.), 123 F. 2d 70, 72; cert. den. 62 S. Ct. 633; 315 U. S. 805; 86 L. Ed. 1204.

CONCLUSION.

For the foregoing reason, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

In re Joslyn (1955, 7 Cir.), 223 F. 2d 184:

Before DUFFY, *Chief Judge,* MAJOR and FINNEGAN, *Circuit Judges.*

MAJOR, *Circuit Judge.* The instant controversy casts serious doubt upon the ancient and widely acclaimed principle that all earthly matters must sometime come to an end. The appellant, Thomas Hart Fisher, appeals from an order of the district court, entered July 2, 1954, overruling objections and exceptions by Fisher to a report of a Referee in Bankruptcy which had denied Fisher's petition for the allowance of attorney's fees for services rendered in the matter of George R. Joslyn, bankrupt, and for reimbursement of expenses incurred in connection therewith. This bankruptcy proceeding has given rise to bitter and prolonged litigation, as is evidenced by five previous appeals to and decisions by this court. *In re Joslyn's Estate,* 7 Cir., 168 F. 2d 803; *In re Joslyn's Estate,* 7 Cir., 171 F. 2d 159; *Young* v. *Handwork,* 7 Cir., 179 F. 2d 70, 16 A. L. R. 2d 825, cert. den. 339 U. S. 949, 70 S. Ct. 804, 94 L. Ed. 1363, rehearing den. 339 U. S. 991, 70 S. Ct. 1021, 94 L. Ed. 1392; *In re Fisher,* 7 Cir., 179 F. 2d 361, cert. den. *Kerner* v. *Fisher,* 340 U. S. 825, 71 S. Ct. 59, 95 L. Ed. 606; *In re Joslyn,* 7 Cir., 198 F. 2d 673, cert. den. *Benevolent & Protective Order of Elks of U. S.* v. *Joslyn,* 345 U. S. 905, 13 S. Ct. 640, 97 L. Ed. 1341. Few, if any, of the numerous lawyers who have participated in this extended litigation, including the bankruptcy trustee, have escaped a charge of wrongdoing. Even judges whose hands have touched the proceeding have not remained immune from charges of bias and prejudice.

In the view which we take of the present situation, we need do no more than refer to our previous decisions for a

statement of the background facts. Subsequent to the mandate of this court in *In re Joslyn*, 7 Cir., 198 F. 2d 673, a number of attorneys, including Fisher, as well as the trustee in bankruptcy, filed claims for fees for services rendered in connection with the proceeding and for the reimbursement of expenses incurred in connection therewith. Thereupon, the matter was referred to a Referee in Bankruptcy to hear proofs and to report whether claimants were entitled to an allowance and, if so, the amount thereof, and to report his findings and conclusions to the court. Fisher refused or neglected, for reasons subsequently shown, to participate or take part in the hearing before the Referee. Extensive hearings, however, were held relative to the other claimants, some of whose claims were allowed, some denied. Inasmuch as Fisher alone has appealed, we need not be concerned with the manner by which the claims of others were disposed of.

(1) Fisher, on April 2, 1953, filed his petition for fees, which stated generally the services he had rendered, the amount of time which he had spent and money which he had expended for which he claimed reimbursement. Defendant here attacks the sufficiency of this petition as not being in compliance with the provision of the Bankruptcy Act relative to claims. However, we need not be concerned with any issue on this score because subsequently, during the course of the proceedings before the Referee, Fisher filed an amended claim which defendant contends was filed without leave of court. The record indicates that Fisher was given oral leave, both by the court and by the Referee, to file his amended claim. In any event, the Referee in his report makes numerous references to the fact that it was filed, and the treatment accorded it strongly indicates that the Referee considered it as properly filed. Moreover, no objection was interposed by defendant to the filing of the amended claim or to its consideration by the

Referee; in fact, defendant's counsel in oral argument before this court stated that he joined in the request that it be introduced into and made a part of the record. Under these circumstances, there is no merit to defendant's contention that the amended claim should be ignored.

It is not contended, as we understand, but that the amended claim complied with the relevant provisions of the Bankruptcy Act, 11 U. S. C. A., Sec. 1 *et seq.* This claim covers fifteeen pages of the printed record and itemizes in great detail the services rendered by Fisher and the number of hours spent in connection therewith, which in the aggregate total 7,702¾ hours. Fisher also in his amended claim sought reimbursement for an unpaid balance of $6,055.75, for cash disbursements made by him in connection with the rendition of his services.

It is important to note, as this court held on a previous appeal, 168 F. 2d 803, 806, and as all parties now concede, the Joslyn bankruptcy is and was a solvent estate. It appears under the rationale of *Watkins* v. *Sedberry*, 261 U. S. 571, 43 S. Ct. 411, 67 L. Ed. 802, that in such a situation the applicable rule and the procedure to be followed is different from that of a case where the estate is insolvent. Without attempting a detailed discussion of that case, it clearly appears that such a situation results in an adversary proceeding between the claimant and the bankrupt, in which the creditors of the estate are without interest or concern. This is important because it forms the basis for Fisher's contention that the Federal Rules of Civil Procedure 28 U. S. C. A., were applicable and that the parties were entitled to a determination of the issues, either by the court or a Master, prior to a hearing and decision.

In response to Fisher's petition, defendant filed an answer which covers some forty-six pages of the printed record. In this voluminous document there is not a single

word of denial that Fisher rendered services as claimed, or that the time for which he claimed was excessive, or that he expended the money for which he claimed reimbursement. The answer commences:

> "For answer to the petition of Thomas H. Fisher, George R. Joslyn alleges that Thomas H. Fisher has been using and abusing the process of United States Courts in this proceeding and the process of the courts of Illinois in other proceedings, all as a part of a scheme by the said Fisher for extorting money from this respondent and the members of his family for his own personal gain, and because of such disreputable, fraudulent and unprofessional conduct, said Fisher has no standing in this or any other court for the purpose of recovering either fees or disbursements."

And it concludes:

> "Wherefore said Fisher has no standing in this Court or any other court to recover any fees or any disbursements and the petition of Thomas H. Fisher should be denied and the costs herein should be taxed against Thomas H. Fisher."

In support of the scheme with which Fisher was charged, defendant in his answer sets forth in great detail the proceedings in the bankruptcy matter from its inception, including numerous and lengthy colloquys which took place in court and in which Fisher was a participant. The answer also described the proceedings in and set forth quotations from the opinions of at least six Illinois State court cases which involved alimony claims, suits for separate maintenance and divorce proceedings between the bankrupt and Charlotte C. Joslyn, his wife, who was represented by Fisher.

On May 15, 1953, Fisher filed objections and his motion to strike defendant's answer. In this motion it was alleged that none of the allegations in the answer, including those relative to the State court litigation, had any relevancy or materiality to the fee application and that the allegations

relative to the bankruptcy proceedings had been considered and decided by this court on previous appeals, and that the decisions on such questions were *res adjudicata* and constituted an estoppel against the charges now directed at Fisher. Fisher further set forth in his motion in some detail the size and extent of the records made on previous appeals, together with the costs and expenses incurred, which in total amount exceeded the sum of $50,000. The record is not too clear, but it appears that the court referred Fisher's objections and motion to strike to the Referee. In any event, the motion was not ruled upon until after the hearing before the Referee had been terminated and his report made.

The Referee found that Fisher had "refused to testify in support of his petition," that such refusal had "prevented any inquiry or cross-examination in respect of the items in the amendment to his petition," and that his refusal to testify "prevented direct inquiry into his conduct as an attorney in this proceeding although in the answer and amendment to the answer of George R. Joslyn, Fisher was charged with improper conduct." The Referee concluded that there was no evidence to support a recommendation for fees and expenses to Fisher, and that Fisher had "deliberately waived any and all claims to an allowance to attorney's fees and reimbursement of expenses in this proceeding by his refusal to appear and testify before the undersigned in support of his petition as amended."

(2) In our view, this being an adversary proceeding, Fisher as well as the defendant was entitled, prior to a hearing, to have the material issues between the parties defined, and this is what he attempted to have done by his objections to the answer and his motion to strike. Until this was done, he had no alternative but to refuse to testify in view of the apparent purpose of defendant, as evidenced

by the allegations of his answer, to relitigate all that had gone before, both in the bankruptcy proceedings in the Federal courts and in the marital litigation which had taken place between Joslyn and his wife in the State courts. Furthermore, as we have noted, Fisher's sworn amended petition for fees and reimbursement of expenses, itemized in meticulous detail, was not challenged by defendant in his answer or in any other form. Thus, it would seem that Fisher's amended petition under such circumstances was sufficient, at least to make a prima facie case, which cast the burden upon the defendant to overcome. The Referee, as we understand, refused in this absence of Fisher to consider any proof offered by the defendant in support of his affirmative defenses. Certainly Fisher was under no obligation to appear at the hearing before the Referee for the purpose of refuting the so-called affirmative defenses, until it had been determined that they were material. We think that Fisher waived nothing by his failure to appear.

(3) In our view, the conclusion is inevitable that the district court erred in its refusal or failure to formulate the relevant issue or issues prior to the hearing. Even so, we are troubled as to the manner in which we should return the matter to the district court. We have refrained from making more than a brief comment upon the nature of defendant's answer, which sets forth his so-called affirmative defenses, for the reason that we think it is for the trial court to determine in the first instance whether they or any of them are sufficient to withstand Fisher's motion to strike.

(4, 5) We hope, however, it will not be considered as presumptuous on our part to make a few general observations, only with the thought that they may be of some aid in bringing to a termination this prolonged and vexatious litigation. In reading defendant's answer, as well as his

brief in this court, it is evidently his intention and undoubtedly his purpose to relitigate many issues which have heretofore been raised and decided. This he is not entitled to do because these previous decisions are *res adjudicata*, they are the law of the case. This is so notwithstanding what has been held or stated by the Illinois courts either in actions related or unrelated to the instant litigation. So that there will be no misunderstanding, we perhaps should make reference to defendant's argument that Fisher represented no client who had a provable claim in the bankruptcy proceeding. This same contention was made on the second appeal to this court. This court rejected the contention, however, and held 171 F. 2d 159, 167, "It is our view that the Elks has a provable claim in the bankruptcy proceeding, and we so hold." On this point, this is the law of the case. We only mention this one point because defendant appears to contend that this court in a later appeal, 198 F. 2d 673, 674, changed its ruling on the point under discussion. We do not so understand. The court in the latter case was discussing the relation which the Elks sustained to the receiver in the State court and not its status as a creditor in the bankruptcy court. Finally, defendant claims that Fisher's contract of employment with the Elks is champertous and that no recovery can be had thereunder. We think there is no merit in this contention but, in any event, it is immaterial because, assuming that it was, it would constitute no bar to a recovery by Fisher on a *quantum meruit* basis. *Watkins* v. *Sedberry*, 261 U. S. 571, 576; 43 S. Ct. 411, 67 L. Ed. 802.

The order appealed from is reversed and the cause remanded, with directions that the relevant issue or issues be determined as a prerequisite to and as a basis for a hearing and decision.

Hillmer v. *Chicago Bank of Commerce* (1953), 349 Ill. App. 510, Appeal denied 351 Ill. App. XV, 111 N. E. 2d 194, appeals from the state court order on which the decree *In re Joslyn*, 102 F. Supp. 521, was based:

MR. JUSTICE NIEMEYER Delivered the Opinion of the Court.

The Benevolent and Protective Order of Elks of the United States of America, a corporation, and John Marshall Law School, a corporation (hereinafter respectively called the Elks and Law School), creditors of the insolvent Chicago Bank of Commerce, appeal from five orders entered in this cause, a creditors' suit to enforce the constitutional and statutory liability of the stockholders, as follows:

(1) Order entered July 12, 1951, permitting M. L. Joslyn to file his petition offering to pay $57,100 in full settlement of the liability of his son George R. Joslyn (hereinafter called Joslyn), a stockholder defendant.

(2) Order of July 18, 1951, approved by plaintiffs and certain defending stockholders (hereinafter referred to as overpaying stockholders), accepting the offer; finding that said sum had been paid to the receiver in open court; ordering and decreeing that the rights, claims, etc., of each and every creditor against Joslyn arising because of his ownership of stock in the bank be and the same are thereby satisfied in full and completely discharged; permanently enjoining and restraining each and every creditor of the bank, their agents and attorneys from instituting and from prosecuting any claims, demands, actions, causes of action, proceedings at law or in equity against Joslyn on account of any claim, demand, debt or right because of ownership of stock in the bank.

(3) Order of August 22, 1951, ordering that the receiver pay and distribute to Wade Fetzer, Jr., and other stockholders (hereinbefore referred to as overpaying stockholders) $50,972.79, the balance of the refund to which

they were entitled under decree entered February 14, 1950 finding that the stockholders named therein had made overpayments totaling $145,636.56 on their liability and imposing a trust, for the use and benefit of the overpaying stockholders, upon all the funds then in the possession of the receiver and all moneys to be thereafter received by him on account of liabilities of stockholders after payment from said funds and moneys of all the costs and expenses of the receivership.

(4), (5) Orders entered September 20, 1951 (a) modifying the provisions of the order of July 18, 1951 enjoining and restraining the creditors of the bank, their agents and attorneys; (b) denying leave to the Elks and Law School to file their respective petitions presented September 13, 1951.

Thomas Hart Fisher, one of the attorneys for the Elks but not a party to the record, appeals from the order of July 18, 1951 and the order of September 20, 1951 modifying the prior order.

The bank commenced business April 5, 1930. June 25, 1932 the Auditor of Public Accounts closed it and instituted liquidation proceedings. On the same day Armin F. Hillmer and others, as representatives of all creditors of the bank, instituted this suit to enforce the liabilities of the stockholders to the bank creditors. May 9, 1934 an amended and supplemental complaint was filed alleging, among other things, that the defendant Joslyn was the owner of record of 1142 shares of the par value of $50 per share from February 10, 1932 to June 25, 1932 and is liable to the creditors of the bank for the aggregate par value of his stock, or $57,100. In 1936 Joslyn filed a petition in bankruptcy, was adjudicated a bankrupt and discharged. September 16, 1938 he filed his answer herein, setting up his discharge in bankruptcy.

The bankruptcy proceedings were reopened May 20, 1946 on petition of the Elks as a depositor in and creditor of the bank, alleging fraudulent concealment of assets and fraudulent misrepresentation of creditors in the sworn bankruptcy schedules (*In re Joslyn's Estate,* 171 F. 2d 159; *Young* v. *Hanwork et al.,* 179 F. 2d 70). On the same day, "in order to preserve the estate and to prevent loss thereto," all persons were enjoined from in any manner prosecuting any action or suit against Joslyn or against any of his assets without leave of court. June 30, 1950 Joslyn filed his petition praying that his stockholder's liability be determined and that he be permitted to pay all claims and the costs, fees and expenses assessable against the bankrupt estate. The trustee in bankruptcy answered the petition. He also filed a set-off and counterclaim. The overpaying stockholders intervened, setting up a preferred claim of $50,972.97—balance of refund due under decree entered herein February 14, 1950. Hillmer on his own behalf and as representative of all other creditors of the bank filed a claim, based on Joslyn's liability as a stockholder, for $57,100 and legal interest at 5 per cent from the adjudication of Joslyn as a bankrupt in 1936. The referee reported March 16, 1951, recommending that the claim against Joslyn because of the ownership of stock in the bank be determined in this cause and that the claim as determined herein be filed, allowed and paid in the bankruptcy proceeding. While the report was under advisement judgment for $57,100 was entered in this cause against Joslyn, paid by his father, and all liability of Joslyn as a stockholder satisfied in full and completely discharged on July 18, 1951. November 8, 1951 this settlement and adjustment of Joslyn's liability as a stockholder was approved by the bankruptcy court and the petition of the overpaying stockholders held to be a matter to be determined in this cause. *In re Joslyn,* 102 F. Supp. 521, aff'd.

198 F. 2d 673; certiorari denied by Supreme Court of the United States. On August 22, 1951 an order was entered herein, directing payment to the overpaying stockholders of $50,972.79, the balance of the refund due said stockholders under the decree of February 14, 1950.

September 13, 1951 the Elks asked leave to file its petition herein, alleging among other things the foregoing matters and proceedings and praying that the orders of July 18, 1951 and August 22, 1951 be vacated, set aside and declared to be null and void for all purposes, and that the receiver be ordered to make no further distribution of said sum of $57,100 until further order of court. On the same day the Law School asked leave to file its petition, alleging full payment and satisfaction of the decree of February 14, 1950 and praying for a decree that the claims of the overpaying stockholders have been fully satisfied of record. Leave to file the petitions was denied September 20, 1951, and that part of the order of July 18, 1951 restraining and enjoining the creditors of the bank, their agents and attorneys from instituting and prosecuting any claims, etc., against Joslyn on account of ownership of stock in the bank was modified by adding thereto a provision that said creditors, their agents and attorneys, are not enjoined and restrained from prosecuting their rights in the Joslyn bankruptcy proceeding, but that said creditors are individually and severally permanently enjoined and restrained from claiming or asserting in said bankruptcy proceeding that the liability of Joslyn by reason of his ownership of stock in the bank, including liability for interest, if any, exceeds $57,100 heretofore paid to the receiver herein, and from claiming or asserting in said bankruptcy proceeding that the stockholder's liability of Joslyn has not been released and satisfied in full pursuant to the order of July 18, 1951.

[1] The order of July 18, 1951 (hereinafter called the settlement order) authorized settlement of Joslyn's liability as a stockholder by payment of $57,100, the aggregate par value of stock owned by him. The settlement was executed by payment of the required sum and the satisfaction and discharge of Joslyn's liability. The money was paid by his father. It was never an asset of Joslyn or under the control and jurisdiction of the bankruptcy court. The settlement was approved by the bankruptcy court (102 F. Supp. 521) and the Court of Appeals (198 F. 2d 673). Certiorari denied by the Supreme Court of the United States March 9, 1953. The Elks and the Law School (hereinafter called petitioners) contend that Joslyn should have been charged with interest at 5 per cent per annum from the commencement of the bankruptcy proceeding in 1936, more than $40,000. No provision of constitution or statute supports petitioners' claim. We know of no Illinois case in which interest has been added to the amount found due from a stockholder. Each reported case affirms the rule in equity allowing interest in a proper case, although not within the precise terms of the statute, if its allowance is warranted by equitable considerations. Interest was denied in these cases because the facts did not establish equitable considerations necessary to the allowance of interest. Thus, in *Lewis* v. *West Side Trust & Sav. Bank,* 376 Ill. 23, it is specifically stated that there is no claim of fraud as a reason for the allowance of interest, and that vexatious delay is not shown. Petitioners base their claim on vexatious delay, effected by fraudulent concealment of assets and creditors in the bankruptcy proceeding.

Reconstruction Finance Corp. v. *Pelts,* 123 F. 2d 503, was an action to enforce the liability of bank stockholders. The nominee of Pelts, without interest in the stock and presumably without financial responsibility, was a stock-

holder of record. She was made a defendant. Without disclosing his interest, Pelts secretly financed and directed her defense. After a decree had been entered against her, Pelts' ownership of the stock was discovered and a decree obtained against him, with interest from the date of the decree against his nominee. In sustaining the decree the court said (p. 505):

> "The appellant knew he was the real owner of the stock in question, and that the liability was his. Nevertheless, he provided attorneys to defend Edith Levinson's case, and stood by and saw judgment go against her, when he knew it was his liability. It may be true that he was under no duty to speak up and assume that liability. He committed no legal offense when he kept still and let judgment go against Edith Levinson, when he knew that it ought to have been against him; but he is certainly in no position to complain when he is discovered, or to ask a court of equity not to charge him with interest."

[2] *McKey* v. *McCoid*, 298 Ill. 566, was a creditor's suit in which an insolvent husband was shown to have paid certain moneys to or for the benefit of his wife. In affirming the refusal of the Appellate court to charge her with interest, the court said (p. 572):

> "While it is immaterial in determining whether or not there was constructive fraud or fraud in law as against creditors in the payments made, (*Harting* v. *Jockers*, 136 Ill. 627; *Marmon* v. *Harwood*, 124 id. 104;) it does affect the question as to whether or not defendant in error would have a right to have interest charged on the amount found to have been paid by the insolvent husband for the benefit of the property of Mrs. McCoid. There is no evidence that she received the sums paid to her for the purpose of aiding McCoid to defraud his creditors. The rule followed in equity is to allow interest where warranted by equitable considerations, but where such allowance does not comport with justice and equity it may be disallowed. (*Golden* v. *Cervenka*, 278 Ill. 409.)"

(3-7) Joslyn was a beneficiary of two trusts, created respectively by his father and mother. He did not schedule his interest in these trusts in the original bankruptcy proceeding. When that proceeding was reopened ten years later, he scheduled his interest without prejudice to his right to assert that such interest was not administerable in the bankruptcy court and was not subject to the payment of his debts. In a suit by the trustee in bankruptcy the trial judge sustained Joslyn's contention. He held that Joslyn's interest in the trusts was not property within the meaning of section 70 of the Bankruptcy act, and that his interest in the trusts and in the income therefrom in the hands and under the control of the trustees of the trust, was clearly within the protection of section 49 of the Chancery act (Ill. Rev. Stats. 1951, chap. 22 [Jones Ill. Stats. Ann. 106.12]) and could not be reached by creditors nor by the bankruptcy trustee acting in their behalf. These holdings were reversed on appeal (179 F. 2d 70) and Joslyn's interest was held to be property within the meaning of the bankruptcy act, transferable by him and administerable in bankruptcy. So the necessity of scheduling Joslyn's interest in the trusts was a question as to which men learned in law differed. Mistake of law is not fraud. No presumption of fraud arises from the failure to schedule the interest in the trusts or from the reopening of the bankruptcy estate. Discovery of substantial unadministered assets, however innocently omitted, from the schedules, would require reopening of the proceedings so that complete administration of assets might be had. (U. S. C. A., Title 11, Bankruptcy, sec. 11.) There is neither allegation nor proof in the petitions presented for filing herein of any fact tending to establish fraud in the bankruptcy proceeding, either in the listing of assets or the person or persons to whom Joslyn's liability as a stockholder was owing. The charge of fraud fails. Merely

appearing and defending this suit is not vexatious delay. *Lewis* v. *West Side Trust & Sav. Bank, supra.* Consequently, there are no equitable considerations warranting allowance of interest.

[8-10] This conclusion effectively disposes of all objections to the settlement order. There was no compromise of Joslyn's liability. The amount obtained by the settlement was the maximum amount recoverable under the constitution and the statute—the aggregate par value of the stock owned by Joslyn. Neither petitioners nor any other creditor of the bank sustained any loss or damage as a result of the settlement. It is, therefore, immaterial whether Hillmer and other creditors, plaintiffs herein, had authority to consent to the order. Because of the approval of the settlement by the federal courts and the remandment of the overpaying stockholders to the state court for determination in this case of their rights to payment of the balance claimed by them under the decree of February 14, 1950, the extended argument as to the paramount and exclusive jurisdiction of the bankruptcy court is no longer relevant.

[11] The order of August 22, 1951 directed payment to the overpaying stockholders of $50,972.79, the balance of the refund due them under the decree entered herein February 14, 1950 fixing the aggregate overpayments of the stockholders named therein at $145,636.56 and directing repayment to the respective stockholders of the amount overpaid by them. No appeal was taken from that decree. It is now final. The amounts therein decreed to be due the respective stockholders cannot now be changed or modified. The contention of petitioners that a percentage of the costs and expenses of prosecuting this suit be deducted from the amount fixed in the decree as owing to the respective stockholders, is an attempt to modify the decree and is wholly without merit.

[12-14] Petitioners have no interest in the amount found to be due the attorneys for the overpaying stockholders, as these amounts are to be deducted proportionately from the amount due the interested stockholders. Only the interested stockholders can complain. There is no error in the order of August 22, 1951. Neither is there error in denying leave to file the petitions presented by petitioners.

[15] Thomas Hart Fisher is not a party to this suit. He is not a creditor of the bank. His only interest is as attorney for the Elks. This is not an appealable interest, and his appeal is dismissed.

[16] Because of the later decision in the federal courts, heretofore cited, affirming and approving the settlement of Joslyn's liability as a stockholder under the order of July 18, 1951, that part of the injunction order of September 20, 1951 purporting to limit the claims to be made by the creditors of the bank in the Joslyn bankruptcy proceedings is now moot. We do not determine the objections made to the order.

Appeal of Thomas Hart Fisher is dismissed: all orders appealed from are affirmed, except injunction order of September 20, 1951.

FRIEND, *P. J.*, and BURKE, *J.*, CONCUR.

In re Joslyn, (1952, 7 Cir.) 198 F. 2d 673, cert. den 345 U. S. 905, 73 S. Ct. 640, next previous appeal:

Before KERNER, FINNEGAN, and LINDLEY, *Circuit Judges.*

KERNER, *Circuit Judge.* This is the fifth appeal or series of appeals in the bankruptcy proceeding of Joslyn since that proceeding was reopened in 1946, ten years after his discharge in 1936.

The present appeals are from orders by which the District Court sought to terminate the seemingly endless litigation which developed after the District Court reopened the proceeding on grounds of fraudulent concealment of assets. The assets alleged to have been concealed consisted of the bankrupt's interest in the income of two trust estates established by his parents for himself and other members of his family prior to his voluntary petition in bankruptcy and not scheduled therein by him — assets which, under Illinois law, probably are not subject to execution but which this court has since held are administrable in bankruptcy. The creditor upon whose petition the proceeding was reopened, hereafter referred to as the Elks, based its claim against the bankrupt upon the latter's stockholder's super-added liability for the debts of an insolvent bank, a claim also asserted by Hillmer and others as plaintiffs in a representative suit then and still pending in the Superior Court of Cook County, Illinois, intended to recover the amounts due under the Illinois law from all stockholders in a bank incorporated under Illinois law, including this bankrupt, and brought in behalf of all creditors, including the Elks.

The final decree and other orders from which the present appeals stem allowed a motion by the bankrupt to strike a motion by the Elks for reassignment of the case for prejudice, denied a motion by the trustee in bank-

ruptcy for leave to file a petition for certificate of civil and criminal contempt and his petition for injunctive relief, approved the well-considered report of the referee in bankruptcy, vacated restraining orders theretofore entered against the trustees of the family trusts except as they were directed to withhold a fund of $50,000 for possible further fees, costs and expenses, vacated orders restraining all persons from prosecuting suits against the bankrupt, denied without prejudice a petition for leave to intervene filed by a group of other stockholders, dismissed a counterclaim filed by the trustee in bankruptcy against those would-be intervenors, allowed fees and costs in the proceedings, directed the trustee in bankruptcy to dismiss certain plenary suits against the family trustees and others, and reserved jurisdiction to adjudicate any remaining claims against the bankrupt for fees, costs and expenses.

The facts of the various aspects of this unduly protracted proceeding have been fully stated in four opinions in the earlier appeals. See *In re Joslyn*, 7 Cir., 168 F. 2d 803, 171 F. 2d 159, 179 F. 2d 70 and 361. They are also succinctly stated in the opinion of the Illinois Appellate Court in a matter which that court considered to be inseparably connected with the bankruptcy proceeding. See *Joslyn* v. *Joslyn*, 337 Ill. App. 443, 449, 457, 86 N. E. 2d 367 appeal denied, 341 Ill. App. xiv. We deem it unnecessary to restate the background facts of the litigation again. As we view these appeals, the only serious question is whether the District Court abused its discretion in, in effect, approving the final settlement of the bankrupt's stockholder's liability in the state court and terminating the bankruptcy proceeding on the basis of that settlement.

The controversy on the present appeals presents the unusual situation of an adjudicated bankrupt, now fully

solvent, having assets far more than enough to pay any claims which might be determined against him in this proceeding, who asked the bankruptcy court to fix those claims and authorized his representatives to pay them in full as fixed by the court, but was resisted on that application by the trustee in bankruptcy. That officer of the court insists upon his right to have all the assets of the bankrupt turned over to him to handle and distribute. While the matter was still pending in the bankruptcy court the father of the bankrupt filed a petition in the state court in the representative suit to which the bankrupt was a party defendant, asking leave to pay the principal amount in full to the receiver upon entry of judgment for that full amount against his son. This was done after informal consultation between the state court judge and the bankruptcy judge who found no objections to this practical solution of the litigation.

[1, 2] We are in entire accord with the District Court's final disposition of this protracted proceeding as explained in his excellent opinion reported in 102 F. Supp. 521. We agree that the receiver appointed in the state court representative suit was the proper claimant to receive the moneys here involved. That suit was brought in behalf of all creditors, including the Elks who have participated in distributions of moneys collected thereby to date, in accordance with the provisions of the state law. See *Hillmer* v. *Chicago Bank of Commerce*, 375 Ill. 266, 31 N. E. 2d 309. According to the Illinois decisions, a class action in equity is the proper mode of enforcing this superadded liability, and when a bank is being liquidated because of insolvency, and a representative action is pending, an individual creditor cannot maintain an action at law to enforce the liability. *Decker* v. *Domoney*, 387 Ill. 524, 56 N. E. 2d 750; *Zimmerman* v. *Zeimer*, 363 Ill. 220, 1 N. E. 2d 854; *Babka Plastering Co.* v. *City State Bank*, 264 Ill. App. 142. See also 3 Zollmann, Banks and Bank-

ing, §§ 1842, 1823. We think these authorities fully support the District Court's disposition of the claim, in effect approving its settlement in the state court where judgment was entered for the full principal amount of the bankrupt's stockholder's liability and satisfied by payment of that amount in his behalf to the receiver.

Appellants contend that our ruling in 171 F. 2d 159, 167, that "the Elks has a provable claim in the bankruptcy proceeding" is in conflict with this ruling. They assert that it follows from our earlier decision that some 12,000 creditors of the bankrupt who have participated in the state representative suit, as well as some 15,000 others who have not participated therein for reasons not disclosed on this record, are entitled to have this bankruptcy proceeding held open for the possible filing now of claims by any or all of these participating or non-participating creditors, all of which claims accrued between April 5, 1930, when the bank commenced business, and June 25, 1932, when it was closed by order of the Auditor of Public Accounts. As the trustee put it in his petition for injunctive relief, "said 15,000 (or more) creditors * * * are each individually potential creditors in bankruptcy having the right to file provable claims in this bankruptcy proceeding, and the right to receive their respective distributive shares of the administrable assets of the bankruptcy estate herein during the usual course of administration" pursuant to the mandate of this court.

It is to be remembered that when we made the ruling now relied upon by appellants we were considering an appeal from the dismissal of the entire reopened proceeding on the ground that the Elks was not a creditor of the bankruptcy estate, and we considered the Illinois decisions cited above in the light of that ruling without seriously considering the right of the representative who had also asserted his claim in the reopened proceedings to prose-

cute it there. Although we had referred to the fact that the status of the Elks in the matter was immaterial since the trial judge could have reopened the bankruptcy proceedings *sua sponte* when his attention was called to the fact that it appeared that the bankrupt had fraudulently concealed assets, we nevertheless ruled that their claim was provable. In this situation we thought that the case, *Brown* v. *O'Keefe*, 300 U. S. 598, 57 S. Ct. 543, 81 L. Ed. 827, was authority for the proposition that the claim was provable in bankruptcy even though the stockholder had been adjudicated a bankrupt and discharged prior to liquidation of the liability and fixing of the amount thereof in the state court proceeding. But we must note now, with reference to the relative status of the representative and the individual creditors, that the claimant in the *Brown* case was the receiver duly appointed pursuant to the National Banking Act, a status which appears to us to be comparable to that of the receiver appointed in the course of a creditor's representative suit to enforce stockholders' liability under the Illinois law. We think Judge Igoe properly recognized this in his disposition of the cause in accordance with the judgment of the state court which had jurisdiction over the class suit. We find no violation of his discretionary powers in the action taken.

The various parties seek to raise many issues on these appeals—the court's disposition of the affidavit of prejudice and of the petition for certificate of contempt, new claims filed against the bankrupt by "non-participating creditors" in the state court proceedings, the so-called ousting of the bankruptcy court's paramount jurisdiction by the final decree, and others. We have considered all of these issues and find them without merit, and we are convinced that no good purpose would be served by stating the facts or discussing the law pertaining to any of them.

Judgment affirmed for reasons stated by the District Court in his opinion.

Joslyn, Thomas Hart Fisher, Assignee v. *Joslyn,* (1949) 337 Ill. App. 443, Appeal denied, 341 Ill. App. XIV, 86 N. E. 2d 367, adjudication of facts pleaded by petitioner as a defense under #43 of General Orders in Bankruptcy.

PER CURIAM.

Defendant George R. Joslyn appeals from a decree entered January 27, 1948 awarding $3500.00 in attorney's fees to Thomas Hart Fisher, former attorney for plaintiff Charlotte C. Joslyn, and directing payment of $1000.00 toward expenses claimed to have been incurred by Fisher in this proceeding and three other cases. Fisher filed a cross-appeal from certain parts of the decree.

August 30, 1939 plaintiff filed her complaint for divorce on grounds of desertion. Defendant filed an amended answer and counterclaim denying the desertion charge and asking for a divorce from plaintiff on the ground that she had been guilty of adultery with divers persons. The trial commenced June 14, 1940 before Judge John Charles Lewe, then of the Superior Court, and continued intermittently until October 1, 1940, when a decree was entered. On September 30, 1940, the day preceding the entry of the decree, the court called plaintiff and defendant into his chambers. Plaintiff told Judge Lewe that she would accept whatever defendant proposed to offer. Defendant offered to pay plaintiff $100.00 a month, and $100.00 monthly for each of the four minor children. The parties agreed upon custody provisions. Judge Lewe then called counsel into chambers and told them of the agreement. Fisher had already been awarded $1000.00 attorney's fees under two prior orders; $1500.00 more was proposed for attorney's fees for him. He did not object to the amount, but asserted that if the attorney's fees were included in

the decree it might look as if he had settled his client's case in order to obtain fees, and accordingly it was agreed that the question of attorney's fees should be decided by the court as though the issues upon the complaint and counterclaim had been decided in favor of George R. Joslyn. He objected to having a mandatory order to that effect inserted in the decree, stating that he thought it would invalidate the decree. The provision is embodied in the decree and set forth verbatim in our former opinion, *Joslyn* v. *Joslyn,* 315 Ill. App. 160. When the decree was presented October 1, 1940, the court asked if there were any objection. Fisher replied that there was no provision in the decree that Mrs. Joslyn might visit the children in the summer time, but he made no objection to the alimony allowance. On December 28, 1940 Fisher perfected an appeal from the agreed provision as to alimony. We affirmed the decree (*Joslyn* v. *Joslyn, supra*). It is apparent from the record, as pointed out in our former opinion, that Judge Lewe was reluctant on account of the children to make an adjudication of adultery against Mrs. Joslyn. He said: "Maybe, I have got to, under the evidence; but I do not want to. Now, do you want me to make a finding of adultery against this woman?" Mr. Hubbard, representing Joslyn, replied: "No; I do not, Judge." The Court then asked: "Why shouldn't this case be settled?" Fisher replied: "We want a finding that Mrs. Joslyn has not been guilty of misconduct. I think the decree should find that neither Mrs. nor Mr. Joslyn has been guilty of adultery." Pursuant to this colloquy the consent decree was entered and the charges of adultery were in effect expunged by judicial decree. Fisher later contended on the first appeal that neither he nor his client agreed in open court to the payment of any definite alimony. We pointed out in our former opinion that upon oral argument Fisher was asked why, if he thereafter intended to question the amount of

alimony allowed, he did not fairly and frankly apprise Judge Lewe of his real position, to which Fisher replied that he felt that Mrs. Joslyn had won a great victory and that he thought it best to say as little as possible at the time. We said that the only reasonable inference that could be drawn from Fisher's conduct is that he desired, above all things, a decree that would find his client not guilty of adultery, and that he was satisfied, for the time being at least, with the amount of the alimony allowed plaintiff. The decree reserved jurisdiction to determine whether or not any attorney's fees should be paid to plaintiff, and as stated in our former opinion, "Fisher was so pleased with the great victory won for Mrs. Joslyn that he was satisfied to have incorporated in the decree a provision that in the determination of the question as to whether any attorney's fees should be paid by defendant to plaintiff the court might consider the matter of fees 'as though the issues upon the counterclaim had been determined in favor of George R. Joslyn' ". We stated that "the instant claim (a sought increase from $500.00 to $1500.00) as to alimony must be considered as an afterthought, for if we assume that counsel intended at the time to thereafter question the amount of the alimony then we must conclude that he was not honest in his conduct toward the trial court. Counsel knew, as he stated to this court, that plaintiff had won a great victory, but he also knew that that victory might be endangered if he then made the claim as to alimony that he now makes." We concluded by finding that plaintiff and defendant agreed as to the amount of alimony that should be allowed plaintiff "and that her counsel acquiesced in the agreement."

On November 8, 1940, thirty-eight days after the entry of the original decree for divorce, Fisher filed a petition for attorney's fees on behalf of Mrs. Joslyn asking that she be allowed $24,190.31 for fees and expenses, against

which there would be credited the $1,000.00 previously paid. On July 1, 1946, some six years later and after a veritable flood of litigation had been carried on in several courts, Fisher rendered a supplemental bill for services to Mrs. Joslyn, who was then residing in Williamstown, Massachusetts. In that statement he itemized his services and expenses as follows: $19,770.00 for professional services in connection with the divorce proceeding in the Superior Court rendered prior to October 1, 1940; $24,723.75 for services rendered from October 1, 1940 to July 1, 1946; $2,745.00 for services rendered in connection with the appeal from the consent decree; and $12,311.25 for professional services in connection with the litigation concerning the Lake Bluff property, the sale value of which he, himself, estimated to be "approximately $12,500"; these items aggregated the sum of $59,550.00. To that statement he added $1,335.00 for professional services in connection with various miscellaneous matters, "including Dr. William F. Wolsey, income tax matters, action to recover custody of children, settlement of creditors' claims and defense of creditors' suits, etc.," making a grand total of $60,885.00. The statement showed that there had been paid on account to him $8,057.14, leaving a balance claimed to be due of $52,827.86. On November 26, 1940 the petition for fees was referred to John J. Kelly, master in chancery of the Superior Court. The decree of October 1, 1940 made *no reservation whatever* of jurisdiction to allow expenses other than attorney's fees. The order of reference to Master Kelly directed him to "take the evidence and report the same to the court together with his conclusions of law and of fact as to whether or not Charlotte C. Joslyn is entitled to any solicitor's fees, and if any, the amount thereof." Other than the above, the master was not directed to make any finding nor was he authorized to hear evidence of expenses other than solicitor's fees.

After an exhaustive hearing the master presented his Amended Report, prepared April 22, 1947, as follows: "The Master finds, and the evidence overwhelmingly supports his findings, that this petition should be denied because the said Thomas Hart Fisher by his actions, his false statements, and his conduct, unbecoming a lawyer in the case before me and in other courts, (has) no standing in this Court and his position in this Court leaves no doubt he is guilty of unclean hands." The master cited seven episodes of Fisher's misconduct, and concluded as follows: "The Master states that the evidence supporting his findings and conclusions are such that it leaves no doubt in his mind as to the guilt of the said Thomas Hart Fisher and that his conduct is inexcusable and the Master finds that the petition is without equity and should be dismissed and that the costs be taxed against the said Thomas Hart Fisher."

Preliminary to a discussion of what Fisher's claim involves, some explanation is necessary of the so-called Joslyn trusts, which were brought into this protracted litigation by Fisher in two separate proceedings. On August 14, 1935 Alice M. Joslyn, defendant's mother, created a trust with 25,000 shares of Joslyn Manufacturing and Supply Company, naming Bently S. Handwork, Ralph C. Boozer and Philip W. Lotz as Trustees. She gave one-fourth of the income to George R. Joslyn during his life. On his death the portion of George R. Joslyn was to vest in his children equally. On the following day, August 15, 1935, Marcellus L. Joslyn, defendant's father, created a similar trust with 20,000 shares of the same stock, naming the same trustees and giving defendant and defendant's children an interest similar to the other trust. Each year, beginning with 1938, $23,000.00 to $40,000.00 has become payable to defendant from the combined income from the two trusts. Since 1938, defendant has had substantially no other income.

June 12, 1938, plaintiff and defendant signed a separation agreement under which substantially all the household furniture was given to Mrs. Joslyn. The home in Lake Bluff was to be her property. Defendant promised to pay the $20,000.00 mortgage against it. Plaintiff agreed not to sell or encumber the same, except with the written consent of defendant, and to make provision that it pass to the children on her death, and if the children predeceased her, then to defendant. Defendant was to pay plaintiff each month $200.00 for herself, and $200.00 for each of the four children until they should reach 25 years of age. These payments, however, were not to exceed 40 per cent of defendant's income. Defendant was to procure an annuity life insurance contract of $200.00 per month payable to plaintiff for life, to commence upon the death of defendant. The separation agreement recites that the trusts created by defendant's parents are the principal source of his income. During the 15 months following June 12, 1938 defendant made payments to and for Mrs. Joslyn in the amount of $15,394.22, an average of $1,029.00 per month.

Fisher's claim for fees and expenses "in connection with" the divorce case, which was the subject matter of the petition referred to Master Kelly and of this appeal, included his expenses and time in three other cases. His activity in a bankruptcy proceeding, which will hereinafter be referred to, is inseparably involved with his activity in the divorce case. In his statement of account in the cross petition filed by him in the divorce case December 19, 1946 Fisher has included his activities in two other proceedings. The matters in which he claims fees "in connection with" the divorce case may be summarized as follows. On September 26, 1938, before the complaint for divorce was filed in the Superior Court of Cook County, Fisher lodged, on behalf of Mrs. Joslyn in the Circuit Court

of Lake County, a complaint against George R. Joslyn for separate maintenance. It alleged the marriage, the birth of the four children, and defendant's desertion of plaintiff on February 1, 1938; it further charged that she had been induced to sign the separation agreement of June 12, 1938 by fraud; that defendant had by fraud induced her to execute deeds of plaintiff's real estate in La Grange, Illinois and in Allegan County, Michigan. The complaint sought separate maintenance, cancellation of the saparation agreement, and cancellation of the two deeds. It should be pointed out that the charge of fraud with regard to the real estate was re-alleged and kept pending after Mrs. Joslyn twice testified, in Fisher's presence, that she never claimed or had any interest in the property. The complaint for divorce, as heretofore stated, was filed August 30, 1939. It alleged that defendant had deserted plaintiff February 1, 1938 and had continued in such desertion. No other ground was alleged, and the complaint was never amended. In this connection it should be noted that if the allegations were accepted at face value, the separate maintenance suit, filed September 26, 1938 in Lake County, had stopped the running of the statutory desertion period at seven months and twenty-six days under the established rule in this State. *Floberg* v. *Floberg,* 358 Ill. 626.

Also included in his claim for expenses and services "in connection with" the divorce case was a suit filed for Mrs. Joslyn, September 14, 1939, against George R. Joslyn, Marcellus L. Joslyn, Joslyn Manufacturing and Supply Company, and the individual trustees of the two Joslyn family trusts, wherein he charged George R. Joslyn and his father with making fraudulent conveyances and concealing the Joslyn assets, and wherein he asked that the income from those trusts be sequestered for Mrs. Joslyn. Fisher never directed that service be made on anyone other than George R. Joslyn, and no one else was served. It will be

noted that Fisher sought by this suit to sequester for Mrs. Joslyn and the children the trust funds he later attempted to sequester in the bankruptcy case for a depositor of the defunct Bank of Commerce.

In his claim for expenses and services "in connection with" the divorce case Fisher included a suit filed for Mrs. Joslyn in the Municipal Court of Chicago. It appears that August 28-30, 1939 the parties agreed that George R. Joslyn should have the custody of the children for the following two weeks. He furnished bond for $50,000.00 conditioned upon the return of the children, and received the children a day late. While visiting with defendant the children were under the supervision of Caroline Pekar, an employee of Charlotte C. Joslyn. On September 14 Caroline Pekar talked with Mrs. Joslyn on the telephone, asking whether it would be all right if the children were returned the following day. Mrs. Joslyn indicated that she expected her to "follow the agreement". The children were in fact returned on the 15th. On September 15 Fisher instituted suit in the Municipal Court of Chicago against defendant and defendant's brother upon the bond of $50,000.00.

As a further indication of his propensity for litigation, Fisher on September 15, 1939 filed a petition for an injunction in the suit then pending in the Superior Court of Cook County alleging that a dividend was about to be paid George R. Joslyn by the trustees of the Joslyn family trust; that unless the court would by injunction restrain the trustees from paying the dividend due September 15, 1939 in the sum of $8437.50 to George R. Joslyn, the plaintiff would be without any adequate means of support and maintenance for herself and the four children; and on the day the application was made on Fisher's motion, the court entered an order restraining the trustees from paying to George R. Joslyn any of the income from the afore-

said family trusts. In this connection it should be noted that later, on June 5, 1944, in the bankruptcy proceeding then pending in the United States District Court, Fisher obtained a similar injunction against these trustees, purportedly on behalf of a depositor of the defunct Bank of Commerce.

Fisher's activity as Mrs. Joslyn's counsel from 1938 to 1946 in the various matters heretofore mentioned, may be explained in part by the following incidents. On August 12, 1940, while the divorce proceeding was in the process of hearing before Judge Lewe, Fisher obtained from his then client Mrs. Joslyn the following assignment in writing: "Know All Men that I, Charlotte C. Joslyn, wife of George R. Joslyn, now residing at 5724 Dorchester Avenue, Chicago, Illinois, do hereby irrevocably constitute and appoint Thomas Hart Fisher, Room 2125, 135 South LaSalle Street, Chicago, Illinois, my sole and exclusive true and lawful attorney coupled with an interest, for me and in my name to demand, receive, sue for, and collect all claims, debts, moneys and demands whatsoever now due or which may hereafter become due to me from George R. Joslyn on account of any alimony payments, *pendente lite* or final, together with any payments to me for solicitor's fees and suit moneys pursuant to any order or orders heretofore or hereafter entered in that certain proceeding pending in the Superior Court of Cook County, Illinois, known as '*Charlotte C. Joslyn, Plaintiff* v. *George R. Joslyn, Defendant,* in Equity No. 39S 9981,' including but without limitation on the foregoing all payments for Seven Hundred Fifty Dollars ($750.00) per month due me for the months of August, September, and October, 1940; and to make, execute and deliver receipts, releases and other discharges for the same, under seal or otherwise, in my name. Upon the nonpayment of any such debt, money or demand whatsoever, I do hereby authorize and direct my

said attorney to begin, conduct and prosecute any action, suit or other proceeding whatsoever for recovering and compelling the payment thereof. And I do further authorize and direct my said attorney, in such manner as he shall see fit, to adjust, arbitrate and settle any such claim, debt, money or demand whatsoever or any other action, suit or proceedings in respect thereto. I do hereby assign, transfer, set over, deliver and convey all right, title, claim or interest which I may now have or hereafter have or claim in or to any moneys now due and payable or hereafter due and payable to me pursuant to any order for alimony, suit money and solicitors' fees pursuant to any order heretofore and hereafter entered in said proceeding now pending in the Superior Court of Cook County as aforesaid. I do hereby authorize and direct my said attorney to appoint in his place and stead as his substitute any attorney or attorneys for me with the full powers herein granted and with full power or revocation; and I do hereby authorize and direct my said attorneys generally to do and perform all acts and things which they may deem expedient or necessary in the premises as fully as I might do if personally present and acting; and I do hereby ratify, approve and confirm whatsoever my said attorneys shall lawfully do or cause to be done by virtue hereof. In Witness Whereof, I have hereunto set my hand and seal in the City of Chicago, County of Cook, and State of Illinois, this 12th day of August, A. D. 1940. Charlotte C. Joslyn (Seal)" Judge Lewe was never apprised of the fact that such an assignment had been executed.

Thereafter, on April 8, 1941, while the first appeal was pending in this court, Fisher obtained a further assignment as follows: "Know All Men that I, Charlotte C. Joslyn (formerly married to George R. Joslyn), now residing at 5724 Dorchester Avenue, Chicago, Illinois, do hereby assign, transfer, set over, deliver and convey unto

Thomas Hart Fisher, Room 2125, 135 South LaSalle Street, Chicago, all right, title, claim or interest which I may now or hereafter have or claim in and to any moneys now due and payable or hereafter due and payable to me for suit moneys, solicitors' fees and alimony over the sum of $100 per month pursuant to any order heretofore or hereafter entered in that certain proceeding pending in the Superior Court of Cook County, Illinois, known as *Charlotte C. Joslyn, Plaintiff* v. *George R. Joslyn, Defendant,* in Equity No. 39 S 9981, provided, however, that the foregoing assignment shall not be deemed to require the undersigned or George R. Joslyn, Defendant as aforesaid, to pay to the assignee hereunder any moneys payable to the undersigned for the support, education or maintenance of the four minor children of the undersigned. And I, the undersigned, do hereby irrevocably constitute and appoint Thomas Hart Fisher my true and lawful attorney in fact for me and in my name to demand, receive, sue for, and collect all claims, debts, moneys and demands whatsoever now due or which may hereafter become due to me and which are hereby described in the foregoing assignment, and to make, execute and deliver receipts, releases and other discharges for the same, under seal or otherwise, in my name; the power herein given by said attorney shall be deemed to be coupled with the interest herein given. Upon the non-payment of any such debt, money or demand whatsoever, I do hereby authorize and direct my said attorney to begin, conduct and prosecute any action, suit or other proceeding whatsover for recovering and compelling the payment thereof. And I do further authorize and direct my said attorney, in such manner as he shall see fit, to adjust, arbitrate and settle any such claim, debt, money or demand whatsoever and any action, suit or proceedings in respect thereto. I do hereby authorize and empower my said attorney to appoint in his place and stead as his substitute

any attorney or attorneys for me with the full powers herein granted and with full power of revocation; and I do hereby authorize and direct my said attorneys generally to do and perform all acts and things which they may deem expedient or necessary in the premises as fully as I might do if personally present and acting; and I do hereby ratify, approve and confirm whatsoever my said attorneys shall lawfully do or cause to be done by virtue hereof. In Witness Whereof, I have hereunto set my hand and seal in the City of Chicago, County of Cook, and State of Illinois, this 8 day of April, 1941. (Seal) Charlotte C. Joslyn."

Simultaneously Fisher and Mrs. Joslyn execute a so-called "letter agreement", prepared by him, which reads as follows: "Mr. Thomas H. Fisher—In order that you may receive compensation and reimbursement for fees and expenses in the foregoing cases I wish you to be paid from whatever moneys I may receive in addition to $500 which I am presently receiving under the divorce decree of October 1, 1940 if the appeal therefrom is successful, and from any interest which I may have in the Lake Bluff property if my counterclaim is successful. Accordingly I am signing contemporaneously herewith two assignments and powers of attorney coupled with an interest, assigning my rights in the Lake Bluff House and under the June 12, 1938 settlement contract in so far as they are assignable, and in any increase which I may be entitled to for alimony and support over $500 per month. These assignments are collateral security for the payment of your past services and expenses already paid and for future attorney's fees and expenses which may hereafter be rendered and incurred by you for my benefit. It is of course definitely understood that when you have received your compensation and reimbursement for fees and expenses, the assignments which I am giving you will be null and void and that

I shall receive all future payments, both for alimony and support and from the Lake Bluff house or otherwise, thereafter. It is understood that your final bill for attorney's fees shall be computed from January 15, 1938 at the rate of $35 per hour for all services rendered by yourself and the other attorneys who have been and will be associated with you. I shall promptly pay you any moneys received by me on account of attorneys' fees and suit moneys based upon my amended petition for solicitor's fees which has been referred to Master John J. Kelly, and any future petition for solicitor's fees and suit moneys which may be filed by me or on my behalf. Yours very truly, Charlotte C. Joslyn."

Fisher asserts that by means of these assignments he became entitled to all sums awarded to Mrs. Joslyn for alimony, suit money and fees in excess of $100.00 a month allowed as alimony and $60.00 support money for the children, but George R. Joslyn's counsel has steadfastly contended that Fisher has obtained, or sought to obtain, to wit, the moneys paid from time to time for the support of the children. This requires a consideration of the executed writs. The order of the Superior Court of September 13, 1939 provides "that George R. Joslyn * * * pay to Charlotte C. Joslyn * * * as temporary alimony and for the support of the four children * * * Seven Hundred Fifty Dollars ($750.00) per month commencing with the month of September, 1939 * * *." Then follows the assignment obtained by Fisher from Mrs. Joslyn on August 15, 1940, which authorized Fisher to collect all claims, debts, moneys and demands whatsoever then due or which might thereafter become due to Mrs. Joslyn from her husband "on account of any alimony payments, *pendente lite* or final, together with any payments to me (Mrs. Joslyn) for attorney's fees and suit moneys pursuant to any order or petition heretofore or hereafter entered * * *, including

but without limitation on the foregoing all payments for Seven Hundred Fifty Dollars ($750.00) per month due me for months of August, September, and October, 1940." In the letter agreement of April 8, 1941, which was executed after the consent decree was entered, Fisher had Mrs. Joslyn express the wish that he should receive any increase to which Mrs. Joslyn "may be entitled * * * for alimony and support over $500.00 per month." In the face of this record it is difficult to believe that Fisher never claimed any of the alimony and support money to which Mrs. Joslyn was entitled. Again reverting to 1946, we find that on December 19 of that year Fisher filed in the Superior Court an answer and a cross-petition, in paragraph 2 of which he alleged that he was entitled to fees as shown by his Exhibits A and B, namely $60,885.00, less payment on account of $8057.14. He then claimed that he was entitled under his assignment, of April 8, 1941, and under his Exhibit B, which was a statement of services, and his Exhibit C, which was the letter assignment, also of April 8, 1941, to assert "all rights of Charlotte C. Joslyn against George R. Joslyn (as well as the trustees of the Joslyn trusts and the First National Bank of Chicago, the depositary of those funds,) which have been heretofore assigned to respondent and cross-petitioner (Fisher) under Exhibits 'A', 'B', and 'C'," (being fees claimed in his petition filed November 8, 1940, and in a supplemental petition and complaint filed February 13, 1946). The supplemental petition and complaint referred to asserts a lien upon the two Joslyn family trusts and upon all the funds accumulated in the First National Bank of Chicago under the injunction in the bankruptcy case (to which we shall later refer in greater detail), and it pays that an order be entered on behalf of Mrs. Joslyn to increase the alimony and support and to direct the trustees of the Joslyn trusts to pay the sums to her. Fisher's cross-petition of Decem-

ber 19, 1946 prays that he be substituted as party-complainant "in lieu of" Charlotte C. Joslyn in the petition for attorney's fees and in the supplemental petition and complaint of February 13, 1946. The record is replete with evidence that Fisher constantly insisted that Mrs. Joslyn pay to him her alimony and support money.

For an understanding of the bankruptcy proceedings instituted by Fisher in the United States District Court, it should be stated that on February 27, 1937 George R. Joslyn filed a voluntary petition in bankruptcy. He listed as liabilities: $57,100.00 on 1142 shares of stock of Chicago Bank of Commerce; $105.60 in taxes; $50.00 to one Dr. Ralph C. Hammill; and $24,214.00 on notes held by M. L. Joslyn, his father. He did not schedule his interest in the two Joslyn family trusts. In due course he obtained a discharge. Joslyn's explanation for not scheduling the two family trusts created in August 1935 was that he then did not know of the trusts. It is not necessary for us to decide or comment on the plausibility of that statement. However, Fisher learned about this bankruptcy proceeding in his representation of Mrs. Joslyn, and in his petition for fees he makes claim for the time expended by him investigating this bankruptcy proceeding and the bank-stock liability of George R. Joslyn, on five separate days in 1940. Thereafter, in May, 1944, Fisher, in the name of the Benevolent and Protective Order of Elks, a depositor of the defunct Chicago Bank of Commerce, filed a petition to have the bankruptcy re-opened. On May 31 of that year he made an affidavit that there were unadministrated assets, consisting of George R. Joslyn's interest in the two Joslyn family trusts; that a dividend of 75 cents was to be paid on the stock held in the trusts on June 15, 1944; and that unless the court entered an injunction, the sum of $8625.00 would be paid by the trustees to George R. Joslyn, to the irreparable injury of the bankrupt estate. On June

5, 1944 Judge Barnes, acting on Fisher's affidavit, entered an order restraining the trustees from paying any income to George R. Joslyn. Thereupon the trustees opened an account at the First National Bank and deposited the income payable by the trust agreements to George R. Joslyn.

Having thus intervened on behalf of the Elks in the bankruptcy proceeding, Fisher proceeded to advise Mrs. Joslyn by various letters sent to her while she was out of the city, of the developments in that branch of the litigation. On June 14 he wrote to "Dear Charlotte" in part as follows "Now that the bankruptcy case is in full swing, there is a bare chance that we will be able to get what we have always been after, *i.e.*, a full and complete settlement. There are some indications M. L. Joslyn would like to 'settle up'; and I am hopeful that we can work a final settlement out of which will end all law suits and uncertainties in the future. It appears that M. L. is much more alarmed about the foreclosure case (of the Lake Bluff home) than I had thought possible. He has not taken his defeat there with quite the antagonism which I had expected. Sincerely, Tom." On November 26, 1946 he wrote Mrs. Joslyn: "Dear Charlotte: * * * By this time you will have the good news that we are drawing toward a climax in the bankruptcy case. * * * This morning's court appearance gave me a good chance to talk to our opponents to see if they would recommend a settlement of all matters in which George is now involved. * * * All of these attorneys (naming the counsel who were present in court representing the various interests) said that they would consult with George and see if a settlement could be worked out. It seems to me that we have every reason to feel optimistic at this time."

On December 27, 1945, George Sturtz, George R. Joslyn's attorney in the bankruptcy case, being unfamiliar with the divorce proceeding, asked that the injunction decree

of June 5, 1944 be modified to permit the trustees of the Joslyn trusts to pay George R. Joslyn $13,000.00. He advised Judge Barnes that Joslyn was in arrears $9000.00 in alimony and that he had borrowed $4000.00 to send to Mrs. Joslyn. At that time Judge Barnes did not know that Fisher claimed part of Mrs. Joslyn's alimony under the assignments. Throughout two or three sessions in the Federal Court counsel for the trustees sought to elicit from Fisher a forthright statement as to the amount of alimony then in arrears. Fisher repeatedly stated that he could not ascertain the amount and that he would have to communicate with Mrs. Joslyn or her present counsel; that he would have to go to the telephone and find out from Mrs. Joslyn's other counsel "what the amount (of alimony) is," and that if Sturtz said it was $9000.00, he (Fisher) would check it. Fisher then asked Sturtz if he would guarantee that the $9000.00 would reach Mrs. Joslyn, and Judge Barnes advised him that counsel should arrange to get the $9000.00 to Mrs. Joslyn and reimburse Mr. Joslyn the $4000.00 he borrowed. Upon this understanding the court released $13,000.00 of the alimony and support money then due. Immediately after the court session Fisher wired Mrs. Joslyn that the money was to be released *for him*. He said: "Bankruptcy Court today ordered Joslyn Trustees and George pay $13,000 for past and future alimony this reimbursing *me* for 1945 alimony in full and guaranteeing your alimony in 1946. This represents a complete court victory to date. Strong evidence George may settle all controversies. Congratulations. Best wishes for 1946." (Italics ours.) On the same day, in a letter to Mrs. Joslyn, Fisher wrote: "Dear Charlotte: * * * Therefore, when you receive the $9,000 check, please endorse it in blank and *forward it to me* by registered mail. * * * Your 1946 income will be paid to you at the rate of $100 per week commencing with the first week in

January. Assuming that you receive $100 per week for the fifty-two weeks in 1946, or a total of $5,200, there will then be left over $800 with which to pay your 1946 income taxes. * * * I know you will be glad that the weekly checks will increase from $80 per week to $100 per week beginning with January, 1946. * * * Sincerely yours, Tom." (Apparently Mrs. Joslyn had been receiving from Fisher only $80.00 a week during the year 1945.) Afterwards, Fisher asked Sturtz to deliver the $9000.00 to him in cash, and he secured from Mrs. Joslyn a special power to endorse the check. Fisher and Crawford, his associate, stood guard at the First National Bank, where the funds were on deposit, and insisted that the bank should not pay the $13,000.00 to George R. Joslyn unless the $9000.00 were delivered to Fisher. Fisher also served a letter on the bank stating that a cashier's check for $9000.00 was to be delivered to him.

On January 4, 1946 Sturtz presented a petition setting up the divorce court order of March 16, 1944, which had directed George R. Joslyn to pay 42 creditors' debts which Mrs. Joslyn had incurred and to set up a reserve for income taxes. He asked Judge Barnes to restrain Fisher from interfering with the payment of the $13,000.00. Fisher told Judge Barnes that he had authority from Mrs. Joslyn to receive the $9000.00 check, but Judge Barnes advised Fisher that he would not pay him the $9000.00, whereupon Fisher brazenly stated to the court: "I have never asked it to be paid to me at any time. The statement that I wanted $9,000 is in error—" When Judge Barnes learned that under the order of March 16, 1944 Joslyn was to pay the creditors directly and to reserve sufficient funds for income taxes, he told Fisher that he had indulged in a trick because Fisher knew the terms of the order. At the same time Fisher argued that the court should not release the $13,000.00. He asserted that

there would be no assets to administer. However, the court released the $13,000.00.

Out of the $9000.00 released by the court, George R. Joslyn made the income tax reserve and paid the 42 creditors listed in the order of March 16, 1944. He also sent a check for $5320.00 to Mrs. Joslyn. Thereafter, on January 15, 1946, Fisher told Mrs. Joslyn that it was imperative that he receive all of the alimony; that if he did not receive it he would be at a disadvantage in appearing for her in court. His letter is as follows: "Dear Charlotte: * * * Please send me the check for the $5,320 at your earliest convenience so that I can truthfully report to the Federal Bankruptcy Court and the Divorce Court that you are not in debt for money borrowed for alimony. The Divorce Court would undoubtedly stop your $500 monthly payments completely if it found you were in debt for past alimony loans. Also, the Federal Bankruptcy Court wants to make certain that your alimony money is being properly applied. I want George to start paying his 1946 alimony by another order in the Bankruptcy Court as soon as I can get it entered, and until I get your past alimony straightened out, I naturally cannot do this. Please, therefore, do not delay in straightening our back alimony out. * * * Please do not delay in closing our matter up so that I am not at a disadvantage in protecting your interests in both the Bankruptcy and Divorce Courts here. I may be brought into either or both of these courts on an overnight notice and asked whether you have incurred any debts for back alimony or living expenses, and I want to make certain that I can truthfully say No on both points."

January 1946 was apparently a dull month in the course of this litigation; nothing was pending in the Superior Court on behalf of Mrs Joslyn. Nevertheless, on January

18 of that year Fisher devised a purely fictitious hearing in the Federal Court; he told Mrs. Joslyn that he had to appear the following Monday before the bankruptcy court to demand 1946 alimony, and that it was essential he receive all the $5320.00 alimony and child support money. He wired her as follows: "Imperative for your protection we appear without delay on Monday before Federal Bankruptcy Court and demand January 1946 alimony now past due. Essential I receive $5,320 certified check Monday so can represent your position truthfully in court and request immediate relief. * * * Deepest thanks. Tom Fisher." Four days later, on January 22, Fisher telegraphed Mrs. Joslyn that he had with difficulty *continued* the hearing upon her alimony (another pure fiction), saying: "Court hearing on increase your income continued with difficulty to Friday. Please telegraph $5320 immediately so I can represent your situation truthfully showing present necessity for receiving $1000 monthly. Fearful all our last five years work protect you will be lost. Further delay this court hearing fatal. Please advise. Thanks. Tom." Apparently the urgency of his telegrams brought the desired result, for Mrs. Joslyn sent him all the alimony and child support money. Fisher's acknowledgment is as follows: "I particularly asked you to get the payment of $5,320 in my hands before the opening of court this morning. Unfortunately I did not hear from you up to the hour of ten o'clock A.M.; and accordingly I sent you the following telegram: (Telegram as above.) This afternoon I have received your letter containing cashier's check for $5320, for which my thanks. This clears the deck and enables me to go forward in the court hearings to get you the increased alimony of $1,000 per month. I will report to you as this matter develops. Sincerely, Tom." George R. Joslyn's counsel assert that large portion of the $5320 alimony and child support was "clear profit" to Fisher.

We have no way of ascertaining the truth of this assertion, but in the light of the circumstances we entertain no serious doubt as to the contention made. Fisher's letters and telegrams show his advances were limited to 1945, and although he talked about $100.00 a week, $80.00 a week is the amount he actually paid, as shown by his letters. Apparently Fisher required Mrs. Joslyn to pay him a considerable part of the alimony received from George R. Joslyn. One letter shows receipt in 1945 of $770.00 of the alimony and child support.

Without referring in detail to the proceedings had before Judge Barnes, lasting several days, it may fairly be stated that the attorney for the trustees in his examination of Fisher, and the court, in questions propounded to him, found it extremely difficult to elicit answers to simple questions touching upon the amount of alimony claimed to be due Mrs. Joslyn, and the fantastic amounts which Fisher then claimed to be due her or him under the assignments that he held. He stated in one instance that under the agreement of June 12, 1938 and the decree of October 1, 1940 the amount of alimony due as of April 8, 1941 (the date of the letter assignment to Fisher) was "to the best of my knowledge and belief the sum of $38,500." Under the agreement of June 12, 1938 he claimed $35,000.00, and for amounts falling due between October 1, 1940 and April 8, 1941, the sum of $3500.00. In addition to these figures, he claimed there was an attorney's fee due him from Mrs. Joslyn of $31,927.50; and "under the four agreements of June 12, 1938, October 1, 1940, December 16, 1942, March 16, 1944, and June 19, 1946, the total alimony obligations exclusive of suit moneys but including the children's interest was $189,500. I know that these agreements were all in effect as of the end of 1946; and that if you compute all the obligations thereunder you will reach that figure of $189,500." The court repeatedly charged Fisher with

disserting facts, and questioned his motives in seeking to reopen the bankruptcy proceedings by asserting in one instance that "I haven't any doubt that for four or five long years it has been your purpose to blackmail and extort from them (the Joslyn family) money by means of this bankruptcy. I haven't the slightest doubt of it"; and in another instance, "It now seems to me that you have been using the processes of this court in order to blackmail and extort. That is the way it looks to me". Subsequently, when the bankruptcy case was assigned to Judge Shaw, he wrote an opinion in the matter, which was reversed by the Circuit Court of appeals for reasons not related to the subject matter of this case. Judge Shaw, after an exhaustive hearing, reached the same conclusion. He said: "The next move in this court came eight years after the alleged bankrupt had been discharged, and was obviously engineered by Thomas Hart Fisher as a sort of a legal blackmail, in an effort to extort enormous fees from George R. Joslyn in connection with the old divorce case." It is apparent that when Fisher, before Judge Lewe on October 1, 1940, objected to any provision in the decree for solicitor's fees in a specific amount, he had in mind compensation far more lucrative than any amount to which he would then have been entitled, and that at that time he hoped to collect much larger sums through means of the first assignment that he then had and the other assignments that he obtained shortly thereafter and while the first appeal was pending in this court. It is difficult to understand the events that followed the entry of the divorce decree on any other theory. It would have been a simple matter for Fisher to have proceeded with the hearing before Master Kelly on the reference made for the sole and only purpose of ascertaining whether he was entitled to fees, and, if so, the amount thereof; instead, Fisher initiated the flood of litigation hereinbefore set forth,

including two appeals to the United States Court of Appeals, none of which had any relation whatever to his claim for the allowance of fees for defending Mrs. Joslyn in the divorce proceeding.

We have never before encountered a situation where an attorney took an assignment from his client for alimony in a divorce proceeding. Fisher sought to justify it before the master by stating that after substantial testimony was taken before Judge Lewe, Mrs. Joslyn found herself short of funds because she did not have any property of her own; therefore "it became important to obtain some money." Accordingly he attempted to make a loan at the Personal Loan and Savings Bank which was at first refused, but he states "they indicated that if I would come in with the assignment, that they would discuss the matter with me. But they wanted to be perfectly sure that the security in the form of her monthly payments was assigned to me. That was the motive upon which the assignment was obtained; namely, to assist in the securing of funds for the prosecution of this litigation on behalf of a woman who did not have any other support than that from her husband, which was inadequate to the requirements of this kind of a case, combined with her living expenses." Having then procured the assignment, as he states, the bank still refused the loan. But obviously Fisher did not consider it necessary to cancel the assignment after the loan had been refused. The reasons which he stated for procuring the first assignment certainly had no relation to the second assignment of April 8, 1941. It has been the recognized practice in our courts that in the defense of a divorce proceeding, where serious charges are made against a wife, counsel may and should properly present the matter to the chancellor and ask for suit money and solicitor's fees on account. The amount of the loan which Fisher sought to obtain at the Personal Loan and Savings Bank was

$400.00. Manifestly Judge Lewe would have awarded him that sum if he had made a proper showing. As a matter of fact he was allowed $500.00 as attorney's fees on account during the progress of the trial, in addition to $500.00 which he had previously obtained. Fisher's explanation of his motive in procuring these assignments is absurd. His present contention that the assignments were legally valid is besides the point. A legal document may be used in furtherance of an ulterior motive. It is the use to which he put these assignments that constitute the vice of the transaction. It may reasonably be inferred from the circumstances of the case, as disclosed by the record, that the assignments were intended as a means for the collection of the fantastic sums which he later claimed.

All through his examination in the United States District Court Fisher sought to make it appear that a large amount of alimony was due Charlotte C. Joslyn on April 8, 1941, when the second assignment was executed. Both the attorney for the trustees who examined Fisher, and the court sought to elicit from him an unequivocal answer as to the amount of back alimony that was claimed to be due. Excerpts from the examination show the reluctance with which Fisher answered the questions of counsel and court. "Q. Was there any alimony due to your client from the bankrupt on the date that you appeared here? A. First appeared in the bankruptcy case, in the spring of 1944? Q. Yes. A. Oh yes. Q. How much? A. I have never figured it. * * * By the Court: Can't you answer that question? By the Witness: I can't give him the figures, sir. I never did figure it. I just don't know. It is very substantial because most of these services were rendered before, and suit money for those comprises the lien. By the Court: He didn't ask you about anything but alimony. By Mr. Johnstone: Q. How much alimony? A. I have never computed it. I don't know. Q. Of the

$100 a month that was payable under this decree dated October 1, 1940, how many defaults had been made by the defendant at the time this assignment of yours was given you? A. My recollection is, that I would have to check my files to answer a question that is five years old. Q. Was there $100 a month paid? A. Back in 1941, April 8th—I have forgotten, I would have to check it. Q. Was there any default in alimony at the time that you got that assignment from your client? A. There was a default in suit moneys and alimony but the amount of either of them I have never figured to that date; I have never regarded that date as important or germane in any way, and I have never figured it. By the Court: The question was, was there a default in alimony? Can you answer that question? By the Witness: I would say that there was, but as I say I have never computed it." As an excuse for not being able to answer this question Fisher stated that he would have to check his records. He said: "My files in this matter are something like five feet thick." The court then adjourned to enable him to check his records.

At the next session of the hearing, the question was again put to him. "Q. That specific question, how much of this hundred dollars a month, referred to in this decree, remained unpaid on April 8, 1941? A. Well, it depends on how you treat the payments that went before. I was going to give them to you, to aid you to understand what I believe to be the fact on that date. I don't know that I can answer your question the way you ask it. The obligations on April 8, 1941, if the Court please, were under two instruments. * * * By the Court: Will you answer that question? By the Witness: I don't think that question that way can be answered, at least not by myself; there were two obligations on that date to pay alimony— * * * Q. Now, do you or do you not have present in this court the records which would enable you to answer that ques-

tion? A. I have never had a record of that type, that I can now recall. If I have I have forgotten it. Q. Do you have present in this court room all the records in your possession containing information as to the account of alimony due from George Joslyn to Charlotte Joslyn on October 1, 1940, and monthly thereafter to April 8, 1941? A. There might be buried in the files of the court over there, and there might be in some of these recorders, something relating to that, but I can't pick it out without at least a great deal of study and effort." Finally the following question was put to him: "I am asking you how much alimony was due, how much was due?" The verbal fencing continued as follows: "A. When? On April 8, 1941? Q. That is right. A. $9,311.24 pursuant to the best calculation I could make under the short time granted me. Q. That is the amount of alimony due under this decree entered October 1, 1940, is that right? A. And under the June 12, 1938 agreement also." His statement to the court and counsel was palpably false, for in his letter of January 15, 1946 to Mrs. Joslyn he enclosed a statement showing all of George R. Joslyn's payments on account of alimony, and referring to this statement he said: "This statement shows that George is fully paid up on his alimony through December 31, 1945"; and he further stated: "The enclosed statement shows that George computed his back alimony absolutely correctly. I am absolutely certain that the enclosed statement is correct."

The master's charge that Fisher, by his actions, his false statements and his conduct, unbecoming a lawyer both in the Superior Court and in other tribunals, rendered himself guilty of unclean hands, is predicated upon seven specific grounds. It would be impossible, without unduly extending this lengthy opinion, to deal with all of these charges separately in any great detail. The first ground is that Fisher falsely and fraudulently induced

Judge Lewe had denied to Mrs. Joslyn her day in court, and insinuated to the court that Judge Lewe was influenced by sinister reasons. Before Master Kelly, Fisher testified that "No agreement was ever made, of any kind, nature or description by me or by my client in my presence, or in the courtroom, or in chambers, for the payment of any definite alimony or support money or court expense money or counsel fees." The report of proceedings certified to by Judge Lewe shows conclusively that all of these statements by Fisher were false. Still later, upon oral argument on the first appeal, Fisher again repudiated the statements made by his client and his tacit consent to the decree by denying the agreement made by him and Mrs. Joslyn before Judge Lewe. We can conceive of no more reprehensible conduct on the part of an attorney against a judge who manifestly sought to prevent what then appeared inevitable, an adjudication of adultery against Fisher's client.

We have already sufficiently set forth the subject matter of the charge by the master that in December 1945 Fisher "fraudulently concealed from Judge Barnes that he would under his agreement with Mrs. Joslyn get all the money allowed to her," and that by "false and fraudulent representations to Charlotte C. Joslyn" he had "induced her to send him $5,223.00 which Judge Barnes intended to be for Mrs. Charlotte C. Joslyn and her children, and which he would not have released if he knew Thomas Hart Fisher would get the money."

That Fisher planned early in the course of this litigation to have a settlement out of the proceeds of the Joslyn trusts is conclusively demonstrated not only by his letters and telegrams to Mrs. Joslyn after he had reopened the bankruptcy proceedings in the United States District Court, to which we have already alluded, but also by the testimony of Marcellus L. Joslyn, given on deposition in

Los Angeles, California, before Master Kelly who went there to take the depositions on February 10, 1941. Mr. Joslyn testified that he first met Fisher in the latter's office on September 26, 1939. He had received a summons to make a deposition in the divorce proceedings then pending. When asked how he happened to go into Fisher's office, he testified that "When I arrived, probably five minutes before the time to take the deposition, Mr. Fisher and others were there and Mr. Fisher said, 'I wish you would come into my office a minute.'" Mr. Joslyn states that he was present with Fisher and one of his associates for about half an hour. After an exchange of pleasantries, Fisher finally said: "'Well, Mr. Joslyn, now you have large business interests and a high personal reputation and it wouldn't be very pleasant for you to have this case go to a public appearance. It would damage you personally and would damage your business and I wouldn't like to see it and it can be avoided.'" Mr. Joslyn replied: "'Why, of course, I would prefer that it shouldn't be. I am more interested in their welfare than in my own. My own welfare doesn't concern me in this case because I don't think it will be affected in any way.' 'Well,' he (Fisher) said, 'it would be a very bad thing and now it ought to be worth a great deal of money to you to avoid this publicity.' 'Why,' I (Mr. Joslyn) said, 'no, it isn't worth anything to me to avoid the publicity for my own sake at all.' 'Well,' he (Fisher) said, 'I know better than you do about that. It would be very bad for you. Now, * * * a lump sum could be arranged that would avoid everything. The case could be closed up and wiped off the board and there would be no public hearing about it at all; no concern. That would be all and you would be relieved from any suffering.' He (Fisher) went on that way and asked me various other questions and came back repeatedly to 'now, a lump sum could be arranged'. And finally I (Mr.

Joslyn) said, 'Mr. Fisher, if you're trying to hold me up personally, I have never submitted to anything of that kind in my life and you can't do it, not for one red cent. I'll not submit to any kind of blackmail, * * * Now, you've gone just as far as I care to go with this proceeding and I suggest that we call it off and return to the action outside which you have held up here for half an hour.'" Fisher and his associate admit the private conference, but deny that any lump sum was discussed. There can be no doubt from the record presented, however, that an attempt was made by Fisher by methods akin to blackmail to secure from George R. Joslyn's father a very substantial settlement after he had been subpoenaed to Fisher's office for the taking of a deposition in the divorce proceedings. Fisher referred to it in his letter of June 14, 1944, to Mrs. Joslyn as follows: "There are some indications that M. L. Joslyn would like to 'settle up'; and I am hopeful that we can work a final settlement out which will end all law suits and uncertainties in the future."

We have already discussed the circumstances indicating that Fisher obtained from Mrs. Joslyn an assignment of all of her alimony above $100.00, and that some of it, as well as support money, was sequestered by Fisher for his own use. The reasons given by Fisher for taking these assignments are utterly untenable.

The master concluded that the evidence overwhelmingly supported his findings that Fisher's "actions, his false statements, and his conduct, unbecoming a lawyer in the case before me and in other courts, give him no standing in this Court and his position in this Court leaves no doubt he is guilty of unclean hands." This finding is supported by Fisher's conduct in substantially all the tribunals in which he appeared in the Joslyn litigation over a period of eight years. The substance of Fisher's answer to these charges is that his claim and the awards made by the

chancellor were for solicitor's fees arising up to, but not after, the entry of the decree of October 1, 1940, and his counsel therefore argue that the extensive litigation thereafter may not be taken into consideration as a bar to the allowance of the fees claimed. It is obvious, however, that the various proceedings subsequent to October 1, 1940, were instituted by Fisher in pursuance of rights acquired by the assignment obtained from Mrs. Joslyn before the divorce decree was entered, and that in the later litigation Fisher was merely seeking to enforce those rights. In effect he waged a campaign to force a settlement from the Joslyn family. He also contends that his conduct does not relate directly to the subject matter of the suit. The plain fact is that Fisher was carrying on a campaign of harassment through court process to force a settlement of all matters, including his petition for attorney's fees. This appears in his letter of June 14, 1944 to Mrs. Joslyn, hereinbefore set forth. Fisher relies on the language of a recent decision, *Mills* v. *Susanka*, 394 Ill. 439, wherein it was held that the doctrine of unclean hands does not "extend to any misconduct, however gross, which is unconnected with the matter in litigation, and with which the opposite party has no concern." It is Fisher's contention that his conduct, or to put it more accurately, his misconduct, does not relate "directly to the subject matter of the (divorce) suit." The principle enunciated in the *Mills* case is sound, but Fisher apparently overlooks the fact that his conduct following the divorce litigation was directly related to the matter of solicitor's fees "in connection with" the divorce case; and certainly it was conduct in which "the opposite party" had a very substantial concern.

In answer to the master's first charge that Fisher had repudiated the agreement that he and Mrs. Joslyn made before Judge Lewe and thereafter appealed from the con-

sent decree, Fisher still asserts that he made no such agreement. We have dwelt sufficiently upon that phase of the litigation. The record discloses an utter lack of good faith in his dealings with the chancellor to whom, as he stated on oral argument on the first appeal, he was indebted for "a great victory," and we think his conduct in that matter alone should deprive him of the solicitor's fees he claims, which would admittedly belong to him and not to Mrs. Joslyn. Fisher's answer to charge No. 3 is nothing more than a specious argument as to the language employed in *Joslyn* v. *Joslyn, supra,* and is predicated on "a statement (made) argumentatively that if certain things were assumed, it would lead to that conclusion, *but that the Court did not state that the assumption was true.*" Although we applied the "light touch" to Fisher's conduct, a reading of the opinion dispels any misapprehension that may exist in Fisher's mind as to our understanding of his motive in first consenting to the decree and then appealing from it. His contention that our opinion was filed long after the services sued for were rendered, and therefore had no relation to these services, has already been discussed. Fisher was then asserting his own interest under the assignment, and everything that followed was related to the same transaction. With respect to the master's charge No. 4, Fisher still seeks to justify the assignment taken from Mrs. Joslyn pursuant to which much of this litigation was instituted and carried on. That transaction requires no further discussion. In his charge No. 5 the master found that Fisher had betrayed the interest of Mrs. Joslyn and her children in the United States District Court on Fisher's motion as an attorney for the Benevolent and Protective Order of Elks and enjoined the trustees of the Joslyn trusts from paying income thereunder to Mr. Joslyn and thus "stopped the only source of alimony and support money" from which Mrs. Joslyn and

the children could be paid. Fisher had undoubtedly represented to Mrs. Joslyn that the bankruptcy proceedings "would help her and her children." He contends that he had previously withdrawn as attorney for Mrs. Joslyn in relation to that proceeding and that he represented only the Elks as a depositor in the defunct bank; but his letters clearly indicate that he sought to make her believe that he was representing her. Whether or not he had withdrawn as counsel, he used the information that he had acquired in the divorce litigation to enjoin the payment of alimony and support money, with the primary purpose of forcing a settlement that would have inured to his own benefit. The master's charge No. 6 relates to the separate maintenance action filed in the Circuit Court of Lake County, wherein Fisher sought to recover two pieces of real estate in La Grange, Illinois and Allegan County, Michigan. As already stated in spite of Mrs. Joslyn's deposition of September 30, 1939, Fisher filed an amended complaint repeating the same charges on November 20, 1940, all of which were later refuted by Mrs. Joslyn's testimony before Master Kelly in December of that year. That charge requires no further comment; nor does the seventh charge, which again relates to the bankruptcy proceedings, in which the master states that "Fisher fraudulently concealed from Judge Barnes that he would under his agreement with Mrs. Joslyn, get all the money allowed to her."

Judge McKinlay, who entered the decree from which this appeal is taken, found "that the conduct of said Thomas H. Fisher as attorney for Charlotte C. Joslyn, plaintiff, as shown by the record in this case, should be censured and is such as to warrant a substantial diminution of the fees and expenses he would otherwise be entitled to receive as attorney for plaintiff, Charlotte C. Joslyn, in this case," and "because of the conduct of said Thomas H. Fisher

above referred to, there should be deducted from said sum of $6,500 (which the chancellor thought to be reasonable compensation for services rendered by Fisher), the sum of $2,000 * * *." There is no way of ascertaining what "conduct" the chancellor had in mind in making these findings in the decree; but it is apparent that the court believed he should be censured, and that a substantial diminution of his fees should be made. We think it would not only be a dangerous and far-reaching doctrine but would violate the accepted ethics of the profession to condone his conduct by awarding him any fees.

It is significant that after pyramiding his fees to the fantastic amounts claimed, Fisher is now willing to accept the comparatively meager sum of $2034.60. In his cross-appeal he seeks reversal only of the court's approval of the master's charges.

[1] The master's fees and charges were taxed and allowed by the court in the amount of $6930.80, of which all, except $2930.80, was paid by the parties in the course of litigation. The chancellor, upon the basis of the master's certificate and the record before him, taxed one-half of this balance, or $1465.40 against Fisher. We think the decree is proper in this respect.

During the pendency of this appeal George R. Joslyn's counsel interposed a motion in the nature of a plea for an order finding that a certain provision in paragraph 14 of the decree was not by the judgment of the court but was by consent of the parties, and praying that Fisher be barred from assigning cross-error on said provision of the decree. That motion was reserved to hearing, and in view of our conclusions as to the merits of the case, we do not consider it necessary to pass upon it.

[2] This case presents flagrant abuses by Fisher of court processes, primarily in his own interest. He has

been fully reimbursed for expenses and suit money. In the light of his conduct, he should not be awarded any fees. *The fees he seeks are not to be paid to Mrs. Joslyn. She disclaims them through her present attorney. Fisher is the real party in interest.*

For the reasons indicated, we are of the opinion that the decree of the Superior Court should be reversed and the cause remanded with directions that a decree be entered in accordance with the master's recommendations, and that $1465.40 costs be taxed against Fisher and $1465.40 against Joslyn.

Decree reversed and cause remanded with directions.

In re Joslyn (1951, D. C. Ill.) 102 F. Supp. 521, opinion adopted in 198 F. 2d 673:

IGOE, District Judge.

This voluntary bankruptcy proceeding, filed originally on February 27, 1936, and in which an order of discharge was entered on June 29, 1936, was reopened on May 20, 1946. Thereafter, in addition to other proceedings, two plenary suits were filed in this District Court by the Bankruptcy Trustee, entitled *Young* v. *Handwork, et al.*, No. 46 C 2082, and *Young* v. *First National Bank of Chicago, D. C.*, 85 F. Supp. 68. In these suits the Bankruptcy Trustee sought to recover for the bankruptcy estate the interest of the bankrupt in two certain trusts created by his father and mother in the year 1935. These plenary suits have been resisted on the ground that the trust interests were not subject to bankruptcy administration. The complaints of the Bankruptcy Trustee in both of the plenary suits were ordered dismissed in the District Court on defendants' motions. The Court of Appeals reversed the order entered in *Young* v. *Handwork et al.*, 7 Cir., 179 F. 2d 70, and remanded the cause for further proceedings in the District Court. The case of *Young* v. *The First National Bank of Chicago* is still pending in the Court of Appeals as Cause No. 10035-6.

Except for claims that have been paid or waived, it appears that the only claim against the bankruptcy estate was for a certain stockholder's liability of the bankrupt with respect to 1142 shares of stock of the Chicago Bank of Commerce, having a par value of $50 per share and upon which the bankrupt had a stockholder's liability of $57,100.

Several attempts were made to settle the claim of the Bankruptcy Trustee against the trust interests for amounts

less than the total amount of this claim against the bankruptcy estate. The last such proposed settlement, in the amount of $45,000 plus costs and expenses of the proceeding, was disapproved by the Honorable Elwyn R. Shaw, Judge of this Court, on the ground that the trust interests were not subject to administration in bankruptcy and that "it would be contrary to the public interest to approve the proposed compromise settlement." The Court of Appeals, in an appeal from Judge Shaw's order, *In re Joslyn's Estate*, 7 Cir., 171 F. 2d 159, rendered an opinion on December 3, 1948, which said in part at page 165: "In what manner the public interest would have been affected by an approval of the compromise we are unable to discern. After all, it was proposed by the bankrupt for the purpose of terminating this protracted litigation, and we think such an objective would have been favorable rather than contrary to the public interest."

On June 30, 1950, the bankrupt filed a petition in this bankruptcy proceeding in which he prayed for the entry of an order directing that his liability as a stockholder of the Chicago Bank of Commerce be determined, and directing that all persons claiming fees shall file their petitions therefor within a period to be fixed by the Court. In his petition, the bankrupt represented to the Court that he was able to pay all claims which were provable against his estate. He sought a judicial determination of such claims, and asked that the costs, fees and expenses assessable against the bankruptcy estate be determined and that he be permitted to pay the same.

The Bankruptcy Trustee filed his answer to this petition. In addition, Wade Fetzer, Jr., and certain other parties claiming an interest in any amount recovered on behalf of the depositors of the Chicago Bank of Commerce, were granted leave to and did thereafter file their inter-

vening petition. The Bankrupt's petition, the answer thereto, the intervening petition and other pleadings were referred to Referee Austin Hall for hearing and report.

The Referee heard evidence and considered briefs filed by all parties, and thereafter in a voluminous and well-considered report recommended that the prayer of the petition of the bankrupt be granted.

Since the only claim against the bankruptcy estate is one for a bank stockholder's liability, and since an action respecting that stockholder's liability is pending in the Superior Court of Cook County in the case of *Hillmer et al.* v. *Chicago Bank of Commerce*, No. 560305, the Referee recommended in his report dated March 16, 1951 that the amount of that claim be determined by the Superior Court, and that thereafter the claim as determined by the Superior Court should be filed, allowed, and paid in this proceeding. As pointed out by the Referee: "* * * to hear the evidence in the instant proceeding on the questions of which of the bank's creditors are also creditors of the bankrupt herein, and how much of the bank's debts accruing in the period of the bankrupt's ownership of stock from February 10, 1932 to June 25, 1932, remain unpaid, would mean that this court would have to hear and determine virtually all of the issues that have already been tried in the representative creditors' suit No. 560305 * * *."

After briefs were filed and the cause taken under advisement by this court, a petition was filed on July 12, 1951 in the Superior Court case by Marcellus L. Joslyn, father of the bankrupt, offering to pay the bankrupt's full stockholder's liability of $57,100, provided the Superior Court would determine the stockholder's liability and enter its judgment. As a result of that action, judgment for $57,100 was entered on July 18, 1951 against the bankrupt, which was thereafter paid by Marcellus L. Joslyn

to Luke F. Cunniff, the Receiver appointed in the Superior Court case. Satisfaction of judgment was given and filed in the Superior Court case, and a release of liability was executed and delivered by the Receiver, Luke F. Cunniff.

Following this action, the bankrupt filed a motion in this court for summary judgment setting forth the proceedings taken in the Superior Court resulting in a payment of his stockholder's liability and a satisfaction and release of the stockholder's liability claim. Certified copies of the Superior Court orders and of the release were filed in support of the motion for summary judgment.

Other matters, including a motion to remove the Bankruptcy Trustee, were filed in this cause, which need not be passed upon at the present time in order to dispose of this bankruptcy case and the other litigation which has grown out of it.

[1] There is no conceivable objection to the payment in full of a bankrupt's creditors.

The payment, satisfaction and release of the stockholder's liability claim and the disclaimer of Marcellus L. Joslyn and Dr. Ralph C. Hamill leave this court with a bankruptcy case without creditors or claimants and with no justifiable reason for holding open this case except for the allowance and payment of claims for fees and expenses. Although the creditors of the bank may not have received payment in full of their claims as depositors of the defunct bank, the bankrupt's liability to them was limited to the sum of $57,100 and was extinguished by the payment of that sum.

The Bankruptcy Trustee suggests that instead of such a simple and equitable method of disposing of this case, there should have been a full accounting in this court between the stockholders and the creditors of the Citizens' Bank of Commerce, and that the creditors of that bank

numbering more than 10,000, should be notified of the pendency of this proceeding, and that claims should be determined and allowed only as to those creditors of that bank who might file their claims in this cause.

[2] It strikes this court that it would be unreasonable and improper to require notice to be given to the more than 11,000 depositors and other creditors of Citizens Bank of Commerce and to permit the filing and determination of such claims in this proceeding. Such depositors and other creditors of the defunct bank, including the Board of Trustees of Orphan Fund, are not parties to this proceeding, and their claims must come up with the Bank Receiver's Report of Public Accounts, and have semblance of jurisdiction to decide as members of the class of creditors represented by Ellison et al. in the Supreme Court case [illegible] a State agency to be heard in such a proceeding. Such depositors of a closed bank is unmeritorious [illegible]

In the case of Crum v. State Bank & Trust Co., 175 Ga. 175, 18 S. E. 2d 570, relied on by the plaintiff in the main proceeding, [illegible] to the Banking Department to settle bank claims [illegible] bring proceeding against officers [illegible] bankruptcy.

The plaintiff, corresponding to creditors [illegible] to collect [illegible] v. Citizens Bank of Commerce, pending in the Court of Civil Claims in this State, [illegible] notice of this proceeding [illegible] amount, and have that a claim [illegible] creditors [illegible] must [illegible] Receiver Court was entered [illegible] 1933, [illegible]

to receive bank stockholder's liability payments, has appeared in this proceeding and testified before the Referee. Following payment of the stockholder's liability judgment in the Superior Court case, he executed and delivered his release of the claim.

As pointed out by the Referee in his report, if this bankruptcy Court were to assume the full responsibility for determining the bank stockholder's liability of the bankrupt, and the pro rata distribution of it among the bank's 13,000 depositors, this Court would have been required to duplicate a great deal of the State Court's detailed accounting in connection with determining the stockholder's liability of the bankrupt, the amount of the claims of each of the depositors and their pro rata claims against the estate.

I do not find that there is anything in this ruling which conflicts with *Brown* v. *O'Keefe*, 300 U. S. 598, 57 S. Ct. 543, 81 L. Ed. 827.

The question of whether Wade Fetzer, Jr., *et al.*, as intervening petitioners, are entitled to recover amounts paid on behalf of the bankrupt's stockholder's liability is likewise one which the State Court should determine. The Referee in his report also found that this would involve relitigation of questions already passed upon by the State Court.

[3] The Bankruptcy Trustee's statement that there might be claims against the bankrupt other than the bank stockholder's liability claim is without merit. The record in this case shows that notice was given to all other creditors listed in the original schedules in March 1936, and notice was given again to all of the other creditors listed in the amended schedules in May, 1946. No other persons have filed claims, and the Bankruptcy Trustee's concern over the claims of Marcellus L. Joslyn and Dr. Ralph C. Hamill is specious. As previously stated, disclaimers have been filed by both of the parties.

It is suggested by the Bankruptcy Trustee that an equitable lien claim might be filed on behalf of Thomas Hart Fisher, but I fail to see how such a claim would possibly affect a settlement of this proceeding. Obviously, the alleged claim of Fisher arose long subsequent to the date of the original bankruptcy to which this entire proceeding relates. Furthermore, it is clear that Fisher's lien claim has been asserted exclusive of the jurisdiction of this Court; and there appears to be no occasion for litigating or re-litigating this same matter in this cause, or preventing settlement of this proceeding on the basis of such alleged claim to an equitable lien. In this connection, this Court's attention has been called to the case of *Joslyn* v. *Joslyn*, 337 Ill. App. 443, 86 N. E. 2d 367, where the basis for Fisher's alleged lien claim was shown to consist of two assignments of alimony from his client, Charlotte C. Joslyn, the former wife of the bankrupt, said assignments being dated August 12, 1940 and April 8, 1941, respectively.

Fisher's claim for attorney's fees, which the Bankruptcy Trustee states may be filed in this cause, was adjudicated adversely to Fisher in the Illinois Appellate Court case, and there has been no reversal of that ruling. It was there held, 337 Ill. App. at page 477, 86 N. E. 2d 383: "This case presents flagrant abuses by Fisher of court processes, primarily in his own interest. He has been fully reimbursed for expenses and suit money. In the light of his conduct, he should not be awarded any fees."

There are funds on deposit in the First National Bank of Chicago in the account of Bently S. Handwork, Philip W. Lotz, and Ralph C. Boozer, Trustees of the two Joslyn trusts, sufficient to pay all claims for fees and expenses which might be filed and proved herein. Subject to appropriate orders being entered herein, the Bank and the Joslyn Trustees have agreed to authorize the payment of such amounts as might be necessary to fully discharge all of

said claims for the fees and expenses incurred in this proceeding, including attorney's fees and the fees of the Bankruptcy Trustee. The restraining orders which have prevented distribution of income from these trusts should be dissolved upon adequate provision being made to pay such costs, fees and expenses.

Section 27 and 47, sub. a(1) of the Bankruptcy Act, 11 U. S. C. A. Secs. 50, 75, as well as the admonition of the Court of Appeals of this Circuit in the prior appeal reported in 171 F. 2d 159, constitute full warrant for this Court to grant the relief prayed for in the bankrupt's petition and motion in order to dispose of this bankruptcy proceeding. The payment of all claims of the bankrupt in full, as well as the fees and expenses allowed and to be allowed by this Court, is a disposition of this protracted litigation to which valid objection cannot be made.

Findings of fact, conclusions of law and appropriate orders will be entered in accordance with this opinion.

In re Joslyn's Estate (1948, 7 Cir.), 168 F. 2d 803 U. S. District Court's findings of fraud and abuse of the bankruptcy process by Fisher were reversed for lack of jurisdiction.

Before KERNER and MINTON, *Circuit Judges,* and STONE, *District Judge.*

STONE, *District Judge.*

On February 27, 1936, George R. Joslyn filed a voluntary petition in bankruptcy in the District Court of the United States for the Northern District of Illinois, and was on that day adjudicated a bankrupt.

The schedules listed no administrable assets, the total value being given at $375.50 of exempt personal property. The schedules disclosed as a debt, the claim of William L. O'Connell, Receiver of the defunct Chicago Bank of Commerce, Chicago, Illinois, arising out of the bankrupt's stockholder's liability on 1,142 shares of the bank's capital stock having a par value of $50.00 per share. There being no administrable assets, no claims were filed, no trustee was appointed, and the bankrupt was thereafter, on June 29, 1936, discharged and the proceedings closed.

Approximately ten years later, on May 20, 1946, the bankruptcy proceedings were reopened on the Application of the Benevolent and Protective Order of Elks, a creditor of the defunct Chicago Bank of Commerce, and an alleged creditor of the bankrupt by virtue of the bankrupt's statutory liabilities as a stockholder of the bank. The attorney for the petitioner was Thomas Hart Fisher, hereinafter referred to as Fisher.

The Application to Reopen alleged that six months prior to the filing of the voluntary bankruptcy proceedings, the bankrupt's parents had created two so-called "Joslyn Trusts", dated respectively August 14 and 15, 1935, pur-

suant to which the bankrupt had received and then owned a vested equitable life estate in 11,250 shares of the capital stock of Joslyn Mfg. and Supply Company.

On January 4, 1946, the bankrupt filed an amended schedule of his assets in which he valued his life estates under the Joslyn Trusts at the sum of $546,757.30. The schedules included the additional item of $70,312.50 as income from the trust estates that had accrued from June 5, 1944, to January 4, 1946, the income being approximately $40,000.00 per year.

During the period from January 1938 to June 1946, Fisher claims to have rendered services as attorney for the bankrupt's wife in a divorce action and other State Court litigation. That during such time he expended on her behalf the sum of $12,846.36, exclusive of the sum of $5,320 that he advanced to her for living expenses for herself and four children in 1944 and 1945, and repaid to him by Mrs. Joslyn in January 1946, and that there is now a balance due him from her for services and disbursements, in the sum of $65,674.22.

When Fisher was employed to file the petition to reopen the bankruptcy proceedings he terminated his employment as Mrs. Joslyn's attorney in relation to any action she might thereafter commence in said proceedings.

In the bankruptcy proceedings a restraining order was entered enjoining The First National Bank of Chicago, the Trustees of the Joslyn Trusts, and the bankrupt from disposing of any of the property or funds in their possession belonging to the bankrupt. Thereafter, on December 27, 1945, the bankrupt's attorney represented to the District Judge that the bankrupt was then in arrears on his alimony and support payments to his wife and children to the extent of $9,000; that he had borrowed $4,000 to make alimony payments to his wife; that at that time the bank-

ruptcy funds on deposit were approximately $70,000.Fisher at that time informed the Court that the alimony payments were based on a contract arising out of a judgment in a divorce action that said contractual rights constituted an equitable lien in Mrs. Joslyn's behalf upon the Joslyn trust funds and all further moneys accruing to the trust estate.

The attorneys had requested the Court to modify the restraining order so as to release to the bankrupt the sum of $13,000 on condition that $9,000 thereof would be paid immediately by the bankrupt to his former wife as alimony and for the children's support, and that the balance of $4,000 would be used by the bankrupt to reimburse him for disbursements he had previously made.

Relying upon statements made by the bankrupt's attorney and by Fisher, the Court entered an order releasing unconditionally $13,000 of the bankruptcy funds on deposit to the bankrupt.

At that time Fisher had written assignments from Mrs. Joslyn assigning to him her equitable lien on the trust funds to insure the payment of her indebtedness to him. He withheld knowledge of this fact from the Court and the bankrupt's attorney.

Upon receipt of the $13,000 the bankrupt paid his divorced wife, Mrs. Joslyn, who then resided in Williamstown, Massachusetts, the sum of $5,500. She thereafter paid Fisher $5,320 of said sum to reimburse him for moneys alleged to have been advanced to her by Fisher for the support and maintenance of herself and children during the time that the bankrupt had failed to make the required payments of alimony and support money to her.

When the Trustee in Bankruptcy learned that Mrs. Joslyn had paid Fisher the sum of $5,320 as aforesaid, and that Fisher claimed an equitable lien against the funds and property arising out of the so-called "Joslyn Trusts," he

petitioned the Court that Fisher be required to turn over the moneys he received from Mrs. Joslyn to the Trustee in Bankruptcy and for an order restraining Fisher from attempting to assert in Bankruptcy Court or elsewhere his alleged equitable lien.

In a summary proceeding the Court found that the bankrupt was on the date of his adjudication as a bankrupt, the owner of a vested equitable life estate in the Joslyn Trusts and that title thereto on that day vested in the Trustee in Bankruptcy; that the assignment from Mrs. Joslyn to Fisher was upon its merits "absolutely void and of no effect;" that Fisher had never had any lien or valid claim to a lien upon the funds in question; that Fisher's representations to the Court in these proceedings were wilfully false in material respects; that the entire activities in the premises and particularly his activities with reference to the obtaining of $5,320 in direct violation of the expressed wishes and indications of the Court in freeing said sum from the restraining order previously entered constituted gross fraud upon the Court and upon the bankruptcy estate and upon the creditors thereof; that Fisher's acts were at all times motivated by his own self interests to procure a financial advantage to himself in his individual capacity, and that he wilfully obstructed efforts to obtain an early settlement of the matter in controversy in the bankruptcy estate. The Court found as a conclusion of law that it had summary jurisdiction of Fisher individually and as an attorney and officer of the Court in the premises; that Fisher's rights, if any, to the alleged lien were acquired by him subsequent to the adjudication in bankruptcy; that the Trustees were entitled to an order directing Fisher to forthwith release his alleged claims against the First National Bank of Chicago, the Trustees of the Joslyn Trusts, and the bankrupt; and for a permanent injunction forever restraining Fisher from as-

serting or attempting to assert any claim based upon the alleged assignments; that the claim of Fisher be dismissed with prejudice to the rights of Fisher to ever assert in this or any other proceedings any claims or assignment based on any of the matters set forth therein or related thereto; that an order be entered directing Fisher to pay to the Trustee in Bankruptcy forthwith the sum of $5,320 and all stenographic charges incurred in these proceedings since December 18, 1946, and that an order permanently restraining Fisher from interfering with the consummation of a pending settlement of the matters in controversy in the bankruptcy proceedings pursuant to the petition of the bankrupt on January 23, 1947, be entered.

The Court then entered the order which reads in part as follows:

"1. That Thomas Hart Fisher forthwith release his alleged claim for an equitable lien herein against The First National Bank of Chicago, the Trustees of the Joslyn Trusts, and the Bankrupt herein, and execute any and all documents and papers necessary to fully protect said parties from the further prosecution of his said alleged claim more completely described in the Findings of Fact and Conclusions of Law this date filed herein.

"2. That said Thomas Hart Fisher, his agents, employees and assigns, be and they are hereby permanently restrained and enjoined from the prosecution or further prosecution of the claim asserted and set forth in Paragraph 2 of the response entitled, 'Special and Limited Appearance of Thomas Hart Fisher,' filed herein January 15, 1947, or asserting or prosecuting any other claim arising out of the same subject matter.

"3. That the said claim of Thomas Hart Fisher is hereby dismissed, and said Thomas Hart Fisher, his agents, employees or assigns, be and they are hereby permanently restrained from asserting the same in this or any other proceeding.

"4. That said Thomas Hart Fisher be and he is hereby

directed to pay Horace A. Young, Trustee in Bankruptcy herein, forthwith the sum of $5,320.

"5. That said Thomas Hart Fisher, Norman Crawford and his and their agents, attorneys and employees, be and they are hereby permanently restrained and enjoined from in any way interfering or attempting to interfere, by engineering appeals in the name of other persons, or otherwise, with the consummation of the settlement presented pursuant to the Petition of the Bankrupt filed herein January 23, 1947.

"6. That the Trustee in Bankruptcy herein is directed to report the total of all stenographic and court report's expense incurred by him and by his counsel since December 18, 1946, to Roy H. Johnson, Clerk of this Court, and that the same shall be taxed as costs of this proceeding by said Clerk, and upon the taxing of the same Thomas H. Fisher be, and he is directed to pay the amount thereof to the Trustee in Bankruptcy forthwith.

"Dated, Chicago, Illinois,

"January 24, 1947.

The question presented on this appeal is whether the Bankruptcy Court had summary jurisdiction to enter the order of January 24, 1947, appealed from.

When the $13,000 was released by the Court in December 1945 and paid to the bankrupt, he was not then insolvent as disclosed by the statement he filed in these proceedings showing his assets to be $656,569.80, and his liabilities $81,479.60.

[1] The payment of the $5,320 to Fisher and the assignment of the lien was completed long after the original bankruptcy was closed and before the proceedings were reopened in May 1946. Neither the money or the lien rights involved herein was at the time in question, property of the bankrupt estate, in the possession, actual or constructive, of the bankruptcy Trustee. It was not administrable property in bankruptcy and the Bankruptcy Court had no summary jurisdiction over it.

[2] The law is well established that a Bankruptcy Court does not have summary jurisdiction over a turnover pro-

ceeding to recover an alleged indebtedness due from a third party to the bankrupt estate, or on property rights claimed by an adverse party who is in possession and makes timely objections to the summary jurisdiction.

In the case of *Maggio* v. *Zeitz*, 333 U. S. 56, 68 S. Ct. 401, 405 it was held that summary turnover orders may only be entered to recover possession of chattles or their proceeds, and may not be entered to recover damages for the withholding or for the value of the property. That summary turnover proceedings are not appropriate to recover "damages for tortious conduct such as embezzlement, misappropriation or improvident dissipation of assets."

[3] The money and property rights involved in these proceedings were neither "chattels or their proceeds" which is a requirement and a necessary foundation of a turnover proceeding under the rule as defined in the foregoing case.

In *Cline* v. *Kaplan*, 323 U. S. 97, 65 S. Ct. 155, 156, 89 L. Ed. 97, the Court said:

"A bankruptcy court has the power to adjudicate summarily rights and claims to property which is in the actual or constructive possession of the court. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478, 481, 60 S. Ct. 628, 629, 84 L. Ed. 876. If the property is not in the court's possession and a third person asserts a bona fide claim adverse to the receiver or trustee in bankruptcy, he has the right to have the merits of his claim adjudicated 'in suits of the ordinary character, with the rights and remedies incident thereto.' * * * It has both the power and the duty to examine a claim adverse to the bankrupt estate to the extent of ascertaining whether the claim is ingenuous and substantial. *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18, 25, 26, 22 S. Ct. 293, 296, 46 L. Ed. 413. Once it is established that the claim is not colorable nor frivolous, the

claimant has the right to have the merits of his claim passed on in a plenary suit and not summarily. Of such a claim the bankruptcy court cannot retain further jurisdiction unless the claimant consents to its adjudication in the bankruptcy court. *MacDonald* v. *Plymouth County Trust Co.*, 286 U. S. 263, 52 S. Ct. 505, 76 L. Ed. 1093.

"Consent to proceed summarily may be formally expressed, or the right to litigate the disputed claim by the ordinary procedure in a plenary suit, like the right to a jury trial, may be waived by failure to make timely objection. *MacDonald* v. *Plymouth County Trust Co.*, supra, 286 U. S. at pages 266, 267, 52 S. Ct. at page 506, 76 L. Ed. 1093. Consent is wanting where the claimant has throughout resisted the petition for a turnover order and where he has made formal protest against the exercise of summary jurisdiction by the bankruptcy court before that court has made a final order."

Cline v. *Kaplan*, 323 U. S. 97, 98, 99, 65 S. Ct. 155, 89 L. Ed. 97.

In the proceedings on the turnover petition, appellant entered a special and limited appearance and denied that the Bankruptcy Court had summary jurisdiction over his personal claims and property rights and at no time consented to have the validity of those claims or rights determined in the bankruptcy proceedings.

It is clear that the Bankruptcy Court had no summary jurisdiction to enter the orders appealed from.

The judgment of the District Court is reversed with directions to vacate and set aside the orders appealed from.

Nothing said in this opinion as amended shall be taken as an adjudication of any question as to whether the Benevolent and Protective Order of Elks was a creditor of George R. Joslyn and capable of filing the petition to reopen the bankruptcy proceedings nor any question as to the trusts known as the Joslyn Trust being administrable assets of George R. Joslyn in bankruptcy.

IN THE DISTRICT COURT OF THE UNITED STATES.

For the Northern District of Illinois,

Eastern Division.

In the Matter of
GEORGE R. JOSLYN,
Bankrupt. } No. 62732

Before Referee Austin Hall, July 10, 1953, 2:00 o'clock P. M.

Present:

Alvin G. Hubbard
Thomas Hart Fisher
William M. Doty
Norman Crawford
John S. Miller
Lommen D. Eley

NORMAN CRAWFORD:

Cross-Examination (continued).

Mr. Fisher intends to return at the earliest opportunity, and at the earliest opportunity to offer his proof in this case, at which time his proofs will, of course, consist of proving up all the time charges, and so forth, in the document, amendment to the petition of Thomas Hart Fisher filed herein June 19, 1953. (Abst. 395.)

JOSLYN'S EXHIBIT 13.

May 14, 1944

BANKRUPTCY PROCEEDINGS—George R. Joslyn.

The following letter was presented to the Board—

"*Mr. Thomas H. Fisher*
Room 2125
135 South La Salle Street
Chicago, Illinois

Re: George R. Joslyn, a Bankrupt United States District Court, Northern District of Illinois, Eastern Division. No. 62732.

DEAR SIR:

Benevolent and Protective Order of Elks of the United States of America, a District of Columbia corporation, desires you to act as its attorney-at-law in filing its 'Application to Reopen' in the above matter and to represent its interests thereafter in all matters in connection with its claims as creditor of George R. Joslyn, Bankrupt.

The Grand Exalted Ruler of the Order has signed the 'Application to reopen' and the Order will be glad to cooperate with you in any further matters in regard thereto; it is our understanding that no court costs or attorney's fees shall be paid to you by the Order and that we shall not be liable or responsible for any part of the same, except that you shall be paid by the Order one-third of all sums recovered by the Order by reason of its claims in this bankruptcy proceeding as your attorney's fees. This arrangement shall not apply to any other sums recovered by the Order as a creditor of Chicago Bank of Commerce, except those sums recovered directly through these bankruptcy proceedings of George R. Joslyn.

In the event that other creditors of the bankrupt, or the bankrupt's receiver or trustee, should desire

you to represent them also this would meet with our entire approval.

Yours very truly,

BENEVOLENT AND PROTECTIVE ORDER OF ELKS OF THE UNITED STATES OF AMERICA, a corporation,

By FRANK J. LONERGAN,
Its Grand Exalted Ruler."

(Abst. 398-399.)

JOSLYN'S EXHIBIT 19C.

Opinion by the Honorable Elwyn R. Shaw filed February 16, 1948, dated February 9, 1948.

Opinion recites the closing of the Chicago Bank of Commerce in 1932 and the stockholder's liability suit against George Joslyn.

(Ex. 19C, p. 2) Recites the formation of the two Joslyn trusts more than three years after the commencement of said suit. That February 27, 1936, Joslyn filed a petition in bankruptcy scheduling his stockholder's liability.

(Ex. 19C, p. 3) Recites the beginning of protracted liaigation by Thomas H. Fisher on behalf of the bankrupt's divorced wife.

The next move in this Court came eight years after the alleged bankrupt had been discharged, and was obviously engineered by Thomas Hart Fisher as a sort of a legal blackmail in an effort to extort enormous fees from George R. Joslyn in connection with the old divorce case. At any rate, the Elks, by Thomas Hart Fisher, on May 29, 1944, claiming to be a creditor of Joslyn, filed a petition to reopen the bankruptcy. Fraud and perjury in the original schedules was alleged, and on reference to a referee there was enough evidence of intended fraud and perjury, and

enough of legal doubt as to the availability of the trust funds to induce the referee to recommend that the matter be reopened. This was done, and the present trustee was appointed and qualified. After extended and expensive hearings the matter came before another judge of this Court who found it necessary to take disciplinary proceedings against Attorney Fisher. These are still pending before still another judge of this Court, and nothing herein said is intended to have any bearing on that case. A change of venue from the first judge brings the matter to my court for consideration of a petition to approve an offer of compromise made by Joslyn and the trustees under the trusts and approved by the Trustee in Bankruptcy.

SHAW,
District Judge.

(Abst. 433-434.)

UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

Chicago 10, Illinois.

Wednesday, June 1, 1955.

Before:

Hon. F. Ryan Duffy, Chief Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Philip J. Finnegan, Circuit Judge.

In the Matter of
GEORGE R. JOSLYN,
Bankrupt.

THOMAS HART FISHER,
Petitioner-Appellant,
No. 11277 *vs.*
GEORGE R. JOSLYN,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the order of the said District Court in this cause appealed from be, and the same is hereby REVERSED, with costs, and that this cause be, and the same is hereby, REMANDED to the said District Court, with Direction that the relevant issue or issues be determined as a prerequisite to and as a basis for a hearing and decision.

FILED
OCT 14 1955

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 439

IN THE MATTER OF GEORGE R. JOSLYN,
Bankrupt.

GEORGE R. JOSLYN,
Petitioner,

vs.

THOMAS HART FISHER,
Respondent.

BRIEF OF THOMAS HART FISHER, RESPONDENT, IN OPPOSITION TO PETITION FOR CERTIORARI.

GERALD G. BARRY
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135 South La Salle Street,
Chicago 3, Illinois,
Attorney for Respondent.

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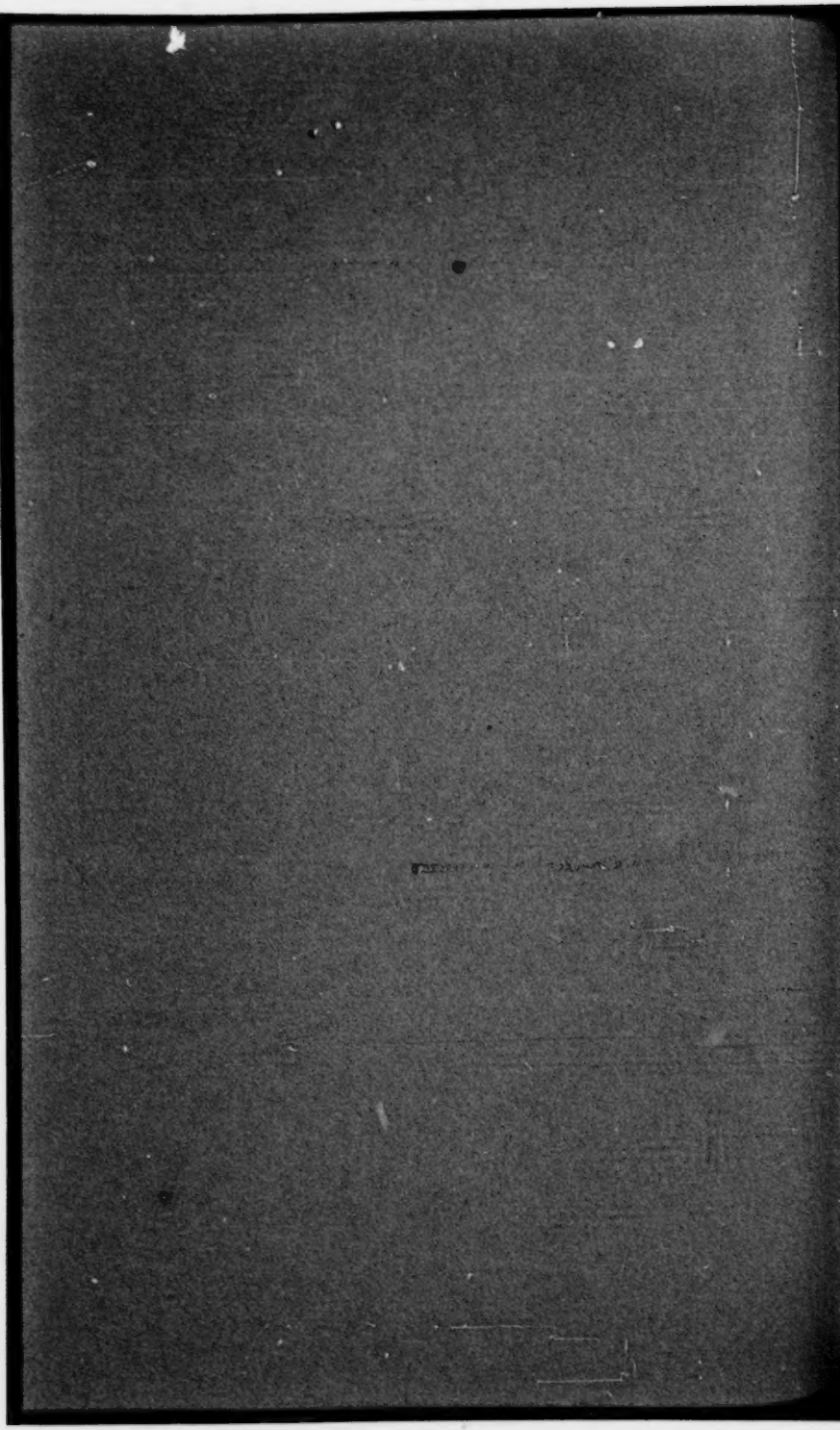

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(3) An alleged conflict between decisions of the same Court of Appeals in the same case on a matter of no general importance is not ground for granting a writ of certiorari 6

(4) As no hearing on the merits has yet been had in the District Court, the question raised by petitioner as to the effect of other decisions purporting to find the respondent guilty of "unclean hands" is premature. Furthermore such decisions are irrelevant as they relate to other proceedings and not to the instant proceeding 6

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(5) Petitioner's contention that recovery of fees by respondent is barred by champerty is contrary to both Federal and Illinois law relating to champerty, and conflicts with the decisions of this Court as to the exclusive jurisdiction of the Bankruptcy court to determine and allow fees 6

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 439

IN THE MATTER OF GEORGE R. JOSLYN,
Bankrupt.

GEORGE R. JOSLYN,
Petitioner,

vs.

THOMAS HART FISHER,
Respondent.

BRIEF OF THOMAS HART FISHER, RESPONDENT, IN OPPOSITION TO PETITION FOR CERTIORARI.

It is difficult for us to believe that the petition for writ of certiorari is filed in this Court in good faith. Not only is there no final judgment in the court below, but no special or important reasons for granting the writ are disclosed in the petition as required by Rule 19 of this Court.

I.

There Is No Final Decision In The Court Below.

The sole effect of the decision of the Seventh Circuit Court of Appeals, as the opinion plainly indicates, is that the order appealed from be reversed and the cause remanded to the district court because the Joslyn bankruptcy involves a solvent estate and the issue as to Respondent's attorney's fees and expenses is an "adversary proceeding" between Respondent and Petitioner, citing *Watkins* v. *Sedberry,* 261 U.S. 571 (App. 3, 5). The court below held, therefore that the trial court erred in failing "to have the material issues between the parties defined" in the pleadings (App. 5-6).

As the court below expressed it (App. 6):

> "In our view the conclusion is inevitable that the District Court erred in its refusal or failure to formulate the relevant issue or issues prior to the hearing."

In the final paragraph of the opinion, the court below summarized its decision as follows:

> "The order appealed from is reversed and the cause remanded, with directions that the relevant issue or issues be determined as a prerequisite to and as a basis for a hearing and decision."

Thus the sole effect of the decision in the Seventh Circuit Court of Appeals was to remit the parties to the trial court in order that the pleadings might be straightened out and thereafter a hearing had and final judgment rendered upon the merits of the controversy.

This Court has repeatedly held that it will not grant a writ of certiorari to review a non-final judgment, such as one remanding a case to the District Court for an original or new trial upon the merits. As stated in *American Construction Co.* v. *Jacksonville T. & K. R. Co.,* 148 U.S. 372, 384, "this court should not issue a writ of certiorari to

review a decree of the Circuit Court of Appeals on appeal from an interlocutory order . . .'' See *Youngstown Co.* v. *Sawyer,* 343 U.S. 579, 584-5. This principle is too well established to require citation of further decisions to the same effect by this Court.

It is, of course, conceivable that after the District Court has straightened out the pleadings and adjudged the same upon the merits, no allowance of attorney's fees and expenses will be made to Respondent by the final judgment in the District Court. In that event, Petitioner would have no complaint or right of appeal at all, and the granting of the certiorari petition by this Court prior to such final judgment would be useless and unnecessary.

The requirement of finality of a judgment, as a condition to appeal, is based upon a strong general policy against allowing piecemeal appeals. The policy behind the rule is to discourage delays, to prevent the cluttering of appellate dockets, and to permit the correction by the trial court itself of its own errors. *Arnold* v. *United States,* 263 U.S. 426; *Collins* v. *Miller,* 252 U.S. 364; *Rexford* v. *Brunswick-Balke Collender Co.,* 228 U.S. 339.

As we point out below, what the petition below is really seeking is to have this Court reform the language, arguments and other expressions by the court below in its opinion, rather than the judgment of reversal itself.

The Supreme Court will not exert its jurisdiction merely to review questions of fact or expressions of opinion in the courts below. *Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271, 275, and cases cited.

Respondent submits that the petition should be denied because there is no final judgment in the court below which can be made the subject of review in this Court by certiorari petition.

II.

The Petition Fails To Show Any Special Or Important Reasons For Granting The Writ Of Certiorari As Required By Supreme Court Rule 19.

It is fundamental that in order to warrant the issuance of a certiorari writ, there must be a substantial controversy or dispute. Subparagraph (b) of this Rule 19 indicates the various types of decisions of the Courts of Appeals which meet this requirement.

In construing Rule 19, this Court has repeatedly said that it is not and never has been primarily concerned with the correction of errors in the courts below, and that certiorari jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing. *Magnum Co.* v. *Coty,* 262 U.S. 159, 163.

Petitioner makes no attempt to show that any of the grounds for the granting of the certiorari writ defined in Supreme Court Rule 19(b) are applicable to this case. No contention is made that the decision in the court below conflicts with the decision of another Circuit Court of Appeals on the same matter. No adequate showing is made that an important state question has been decided in a way in conflict with applicable state law. There is no showing that an important question of Federal law has been decided which has not been, but which should be, settled by this Court. Nor is there any showing that the decision determined a Federal question in a way in conflict with applicable decisions of this Court. There is a contention in the petition that the exercise of this Court's power of supervision is called for, but no showing that the accepted and usual course of judicial proceedings has been departed from in this case.

We submit that this is not a case of peculiar gravity or general importance to the public interest, nor is the writ sought to secure uniformity of decision, and therefore the petition should be denied. Obviously, all that the petition seeks is merely to accord another hearing to the Petitioner as the party defeated in the Court of Appeals.

For failure to make any showing as required by Supreme Court Rule 19, we submit that the petition should be denied.

III.

The "Questions Presented" By Petitioner.

(1) The first question presented by the Petitioner is whether the ruling by the Court of Appeals that the District Court should formulate the issues and thereafter have a hearing upon the merits makes a "farce of judicial process."

The question answers itself. It was actually the order of the District Court denying Respondent his day in court (in accordance with the Referee's erroneous recommendation that Respondent had deliberately waived his claims to an allowance for fees and expenses) which was a "farce", especially in the light of the fact that Respondent's amended petition was sufficient to make a *prima facie* case and to cast the burden upon Petitioner of proving such of his so-called affirmative defenses as should be left in the pleadings after Respondent's motion to strike the same had been ruled upon (App. 5-6).

(2) Petitioner next maintains that both the Court of Appeals' holding that Respondent's amended petition complied with Section 62(d) of the Bankruptcy Act, as well as the assertion by the Court of Appeals that Petitioner was not contending otherwise, were erroneous (Pet., p. 6-8).

We think that the request for the writ of certiorari for the purported purpose of correcting such expressions as these in the opinion below is too trivial to warrant further comment, under the principle referred to in Point II above.

(3) Petitioner next maintains that there is an irreconcilable conflict between the present decision and a prior decision *of the same Circuit Court of Appeals* in determining whether certain creditors represented by Respondent were bankruptcy creditors having provable claims (Pet., p. 8), citing three Illinois Supreme and Appellate Court cases.

Not only is no showing made that these Illinois cases had any relevancy whatever to the question of provability of the claims of Respondent's clients in the Bankruptcy Court, but it is obvious that the Supreme and Appellate Courts of Illinois have no jurisdiction whatsoever to determine Federal bankruptcy issues, such as the provability of bankruptcy claims. (See paragraph (5) below.)

Moreover, a conflict between decisions of *the same Court of Appeals* in the same case, is *not* a ground for granting a writ of certiorari, in any event, since the later decision in point of time is considered controlling within that circuit. *Re Sandford Fork & Tool Co.*, 160 U.S. 247, *Thompson* v. *Maxwell*, 168 U.S. 451.

(4) As the fourth question presented, the Petitioner argues that a certain opinion in the Illinois Appellate Court contains "findings" which are "receivable in evidence in any proceeding" between Petitioner and Respondent, by which Petitioner means the proceeding in the Bankruptcy Court. Petitioner also cites from an expression of the Bankruptcy Court in a "written opinion" filed in the year 1948 (later reversed on appeal) which was critical of Respondent (Pet., p. 12-13, 16-20, 25).

Petitioner's theory (Pet., p. 26) is that the "findings" in the Illinois Appellate Court's opinion must be given "full faith and credit" in the Bankruptcy Court under 28 U.S.C., Section 1738.

Actually, of course, no hearing on the merits ever having been had in the District Court, there is no way to tell whether that court will (erroneously, as we say) give any weight to any of the so-called "findings" of the Illinois Appellate Court, or whether any of the attacks upon Respondent contained in the petition (which we say are wholly unfounded) will be sustained. In other words, it is premature to consider at this time the merits of any of these matters (see Point I above).

However, since the issue seems to be raised as to whether the "findings" in the Illinois Appellate Court are conclusively binding upon the Bankruptcy Court, we point out that the issues in the two courts are not the same. The findings in the Illinois Appellate Court were that Respondent was guilty of "unclean hands" in relation to certain Divorce Court fees, which issue was in no way involved in the Federal Bankruptcy proceeding. It is held that a charge of "unclean hands" in the Federal Court cannot be determined by the actions of the party so charged in any other proceeding. *American Cooperative Serum Ass'n* v. *Anchor Serum Co.*, 153 F. (2d) 907. The same rule applies in Illinois. A charge of "unclean hands" as a defense to an attorney's claim to fees and expenses cannot be effective by reason of any actions of the attorney unconnected with the specific case in litigation. *Mills* v. *Susanka*, 394 Ill. 439, and cases cited.

All that Petitioner's argument amounts to is an effort to anticipate and prevent a hearing and final judgment upon the merits in the District Court once the issues have been settled by the pleadings, merely in order to anticipate and interfere with the trial of the case upon the merits in the District Court.

(5) The petitioner argues that under Illinois law Respondent's employment contract is champertous (which we deny) and that the Illinois law must be conclusive upon the Bankruptcy Court to bar Respondent's right to recover fees and expenses.

No effort is made to meet the rule referred to in the opinion of the court below that the argument as to champerty is immaterial because, in any event, Respondent can recover his fees and expenses "on a *quantum meruit* basis", citing *Watkins* v. *Sedberry,* 261 U.S. 571. See also *Zweifel, Tuohy & Crager* v. *Trans-State Oil Co.,* 99 F. (2d) 650; *In re Tapp,* 65 Fed. Supp. 171, in all of which cases the Bankruptcy Court allowed compensation to an attorney, even though the employment agreement was champertous.

All that the Illinois law holds is that champerty is a defense to a suit upon a contract in an action upon the contract between the parties thereto. *Oil, Inc.* v. *Martin,* 381 Ill. 11. The Illinois cases cited by Petitioner (p. 13-14) were actions upon champertous contracts directly between the parties thereto.

Petitioner suggests (Pet. 14) that this Court has held that the rights of creditors of a bankruptcy estate are fixed by state law, citing *Vanston Bondholders Protective Comm.* v. *Green,* 329 U.S. 156. The *Vanston* case holds that what claims of creditors are *valid* at the inception of bankruptcy is governed by state law, but that what claims are *allowable* and how a debtor's assets shall be distributed in bankruptcy are exclusively within the jurisdiction of the Bankruptcy Court. Moreover, Petitioner is not a "creditor" of the bankruptcy estate. This Court has held that it is the Bankruptcy Court alone which has jurisdiction to pass upon attorneys' fees and expenses and that such jurisdiction is exclusive. *Brown* v. *Gerdes,* 321 U.S. 178;

Leiman v. *Guttman,* 336 U.S. 1. It follows that the Illinois Appellate Court can neither allow nor disallow bankruptcy fees, nor make any material determination with regard thereto.

The question of Respondent's right to attorney's fees and expenses is, as we have said, one which has not as yet been tried and adjudged upon the merits in the District Court. Everything said in the petition in criticism of the opinion of the Circuit Court of Appeals is therefore merely anticipatory to the final judgment which will ultimately be rendered in the District Court upon the merits.

CONCLUSION.

We submit that the petition for certiorari should be denied for lack of a final judgment upon the merits and as premature (see Point I above), and for lack of any special or important reasons therefor as required by Supreme Court Rule 19 (see Point II above).

Any further comment upon the petition in this case would, we feel, be unwarranted.

We ask the Court to consider this Brief in ruling upon Respondent's motion under Rule 56(4) for reasonable damages for delay.

We conclude that the petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS HART FISHER, *Respondent,*

By GERALD G. BARRY,
Room 2125, Field Building,
135 South LaSalle Street
Chicago 3, Illinois,
Attorney for Respondent.